Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

William C. Butler,

Petitioner

v.

Dirk Kempthorne, Secretary,
U.S. Department Of The Interior,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit, Denver, Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

BACKGROUND: Petitioner, a federal employee for 17.5 yrs. in good standing, was separated at age 51 in a 1995 nationwide reduction-in-force. He timely filed with the U.S. Office of Special Counsel a complaint of prohibited personnel practices, unfairness, and denial of seniority. Petitioner then became a *bona fide* member of a certified age-discrimination class of 74 male and female geologists over age 40 . He has never been granted a hearing, and the case has not been tried on its merits.

Can a U.S. District Court dismiss a federal employment case for lack of subject matter jurisdiction and deny the appellant due process if the appellant was granted a Right-To-Sue Letter from the U. S. Equal Employment Opportunity Commission that states their decision is final and there are no further administrative remedies available?

Can a U.S. District Court dismiss a federal employment case for lack of subject matter jurisdiction and deny the appellant due process if the appellant was a *bona fide* member of a certified age-discrimination class who timely filed an individual age-discrimination action when the class was decertified?

Can a U.S. District Court dismiss a federal employment case for lack of subject matter jurisdiction if a complaint was timely filed with Office of Special Counsel and the issue is one of equitable tolling (running of limitations) with the Merit Systems Protection Board — a non-jurisdictional issue?

LIST OF PARTIES

WILLIAM C. BUTLER, petitioner/appellant
DIRK KEMPTHORNE, Secretary, U.S. Department of the Interior, respondent/defendant
No parties are corporations.

JURISDICTION

Petitioner's jurisdiction in U.S. District Court is Title VII of the Civil Rights Act of 1964, 42 USC §2000e-5 and the 1967 Age Discrimination in Employment Act (ADEA) 29 USC 633(a). Petitioner also claimed discrimination for being wrongly discharged, and being denied equal employment opportunities (see doc. 1, Complaint, cover page [jurisdiction] with EEOC's Right-To-Sue Notice). Opinions are in appen. doc. 1A, 1B, 2, and 3. A partial MSPB opinion is on p. 14.

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STATEMENT OF THE FACTS

1. Petitioner was a federal career geologist GS-1350-13 in good standing from May 2, 1978-Oct. 14, 1995, stationed in the Central Region (Denver, CO), Geologic Division (GD), U.S. Geological Survey (U.S.G.S.), Dept. of Interior.
2. Petitioner was served a defective Reduction-In-Force (RIF) Notice on Aug. 14, 1995. 550 GD scientists (37% of workforce) were separated in this RIF, and about 800 were adversely affected. The RIF Notice did not contain the required MSPB appeal form, or a required reason for separation. Nor did it mention appeal rights with EEOC or OSC. Notice stated that appellant's deadline for filing with MSPB was contingent upon "absent a showing of good cause". Petitioner showed good cause by timely filing with OSC.
3. Petitioner's birthday is Jan. 7, 1944, making him 51 yrs. old on the effective day of the RIF.
4. For purpose of the RIF, the Agency quickly developed experimental competitive level codes (CLC's) for the Geologic Division increasing the number of geologist job categories from about 60 to over 400 – almost one for each scientist separated.
5. Petitioner's competitive level code (position) was changed immediately before the RIF from 019 to 059 to put him into a unique one-person "group" that prevented him from competing for other 019 positions. Appellant had an OPM-computed adjusted service date (ASD) of 5-2-1966 which is senior to non-RIF'ed

employee D. Higley whose ASD is 12-9-1967. Higley's CLC was changed from 019 to 046 so petitioner could not exercise his seniority. Both parties were the same GS-grade in the same tenure group in the same small petroleum resource assessment group in the same Branch and both did exactly the same work. Appellant was 10 yrs. older than Higley. Appellant identified 26 other non-RIF'ed geologists who had less ASD seniority than appellant (see doc. 64, p. 34-39 for verified affidavit; p. 50 for Personnel Office's list of CLC changes).

6. 98% of all 784 adversely-affected employees had their CLC's changed. This allowed management to target *people* for separation and downgrades rather than to cut *positions*. OPM rules allow only *positions* to be cut. OPM formulas put the most senior employees at the top of the retention registers and these *people* fill the uncut *positions*. This standard procedure was overridden by the Agency.
7. Management illegally evaluated *people* rather than *positions* when making pre-RIF staffing plans. This is confirmed by testimony of staffing committee members as shown by their meeting notes. These were the documents that survived shredding after each meeting.
8. The Agency maintained an illegal "Add-Back List". After the RIF, the separated employees under age 40 were rehired without competing for positions. Those positions were not available to RIF'ed employees over 40. This scheme circumvented OPM rules for fair competition and showed age animus.

9. The cornerstone of federal employment practices is fairness and equal opportunity as evidenced by the Civil Service Reform Acts, Civil Rights Acts, Executive Orders, and non-discriminatory policies that promote merit principles rather than an archaic spoils and favoritism system. It is fact that the Agency had a good faith duty to treat all protected employees uniformly and to use equitable standards, such as in honoring seniority.
10. Petitioner timely wrote an official complaint to The Office of Special Counsel (OSC) on Aug. 25, 1995, about prohibited personnel practices, including political intrusion, denial of seniority, gross unfairness, appalling procedures, and vindictiveness by a supervisor, Office Chief Gary Hill. (OSC File No. MA-95-2067). OSC replied (appen. doc. 4) that Complaints Examiner, J. Sandra Thomas, would interview appellant, but she never sent a questionnaire and never interviewed him. OSC "dropped the ball" failing to perform their legal obligation to investigate. Appellant was ready and willing to provide additional information.
11. Supervisor Gary Hill was convicted in U.S. District Court as a felon for stealing $50,000 worth of U.S. Government property under 18 U.S.C. §641. (*United States of America v. Gary W. Hill*, 8:02-cr-00431-JDW). Appen. doc. 10 and 11 also document Hill's contempt for civil service rules via his overt admissions to witnesses that he schemed to circumvent merit principles.
12. Petitioner did not appeal in 1995 to Merit Systems Protection Board (MSPB) or Equal Employment

Opportunity Commission (EEOC) as he waited for an investigation from OSC that never happened. Meanwhile, class actions were being filed by the anti-RIF committee CREAM (Central Region Employees Against Mismanagement) of which petitioner was a member.

13. Seventy-four U.S.G.S. employees over age 40 in Denver were separated or downgraded (91.4%), but only seven employees under 40 were separated or downgraded (8.6%). These data are from U.S.G.S. Final Report (Sept. 28, 2004, Agency Summary, p. 11). Ten times as many employees over 40 were affected but business necessity and budget deficit were never shown by the Agency. The 405 early-out retirements in 1995 (the oldest of the workforce) were not included in the 91.4% of RIF'ed employees over age 40. Taking out the oldest employees from the population sample, made the RIF'ing of those over 40 even less likely simply by chance. Statistics thus show an intentional discrimination (disparate impact). Such a gross statistical disparity constitutes a *prima facie* case of discrimination.
14. Christine Turner-Peterson of the Geologic Division prepared an official report prior to the RIF that concluded 400 early-out retirements would be necessary to cover a worst-case 20% budget reduction. If 400 retired, no RIF would be necessary. 405 did accept early-outs. Nevertheless, five months after receiving a full budget from Congress, management went ahead with a massive worst-case-scenario RIF. The

GD budget was not cut, thus showing a RIF was unnecessary for fiscal reasons.

15. An anonymous class-action appeal to the Oct. 1995 RIF was timely filed in Nov. 1995 with the U.S.G.S. Equal Employment Office (EEO), Denver, CO. EEO took 4 years to investigate discrimination claims filed in 1995-1996.
16. A sex+age-discrimination class action timely filed by geologists Throckmorton &Nichols in Jan. 2000, was changed by a Federal judge in May 2003 to an <u>age-discrimination class action including all male and female geologists over age 40 in the Central Region</u>.
17. As a party to the action, petitioner submitted interrogatories to the Agency in May 2004 that included a 1995 letter to his U.S. Congressman complaining of prohibited personnel practices and age discrimination.
18. Petitioner timely filed a Right-Of-Action in June 2005 with MSPB after the class was decertified in May 2005 on *res judicata* grounds. (doc. 64, attach. C, p. 45-45b).
19. U.S.G.S. management gave themselves multiple bonuses (some as many as 5) after the RIF and sent memos to staff urging them to spend year-end money quickly and buy things because they were flush. (appen. doc. 6).
20. Two weeks after the RIF, Nov. 1, 1995, the G.D. Program Managers and Coordinators sent Chief Geologist Leahy a confidential memo (appen. doc. 13) complaining about how they could explain to the workforce that they had just rolled over millions of dollars for the last two fiscal years yet just RIF'ed hundreds of employ-

ees (court doc. 64, attach. D, p. 46). Given that the budget was not cut, the RIF is now seen to have been a pretext.

21. Agency untimely filed 2 documents missing deadlines for Motion For Extension Of Time To File Answer To Complaint, and the deadline for filing Defendant's Answer.
22. Petitioner has diligently pursued his appeal rights from August 1995 to the present.
23. Petitioner's complaint was denied by 10th U.S. District Court and U.S. Court of Appeals for lack of jurisdiction (appen. doc. 1A, 1B, 2, 3).

ARGUMENT

I. Petitioner timely filed with U.S. Office of Special Counsel and later with MSPB/EEOC

Petitioner will show with evidence that he was entitled to file a civil action in federal court by EITHER his timely OSC complaint OR his timely age-discrimination complaint. The evidence shows: 1) a breakdown of merit-based decision-making, 2) disparate treatment and impact, 3) abuse of authority by management, and 4) inequality – all discriminatory issues in RIFs. These substantive issues comprise the contextual background in which the procedural denial of due process and jurisdiction, and the subsequent dismissal of a complaint, are made.

If a defective RIF Notice (court doc. 1, p. 28A-28B) is served, an appeal within 30 days is difficult to construct when no reason is given for the separation. A

reason is required by 5 C.F.R. §351.802 (a)(1) and U.S.F.R. v. 60, n. 165, Aug. 1995, p. 44,253-54,.. "...a specific reduction in force notice **must** cover the action to be taken, the effective date of the action, and the **reasons** for the action.". [emphasis added].

Once a complaint is filed by a separated employee, the burden of proof in an ADEA case is on the employer to show there were reasonable factors other than age (*Meacham v. Knolls Atomic Power Laboratory* , Supreme Court no. 06-1505 (decided 6-19-2008). However, the Agency's argument is that petitioner is not female, and thus he cannot opt-in to their sex+age discrimination claim, and secondly that OSC is not allowed to accept a timely complaint of prohibited practices before MSPB receives it. Both defenses are incorrect because OSC investigates RIFs, and the sex+age claim included males.

The 10th U.S. District Court ruled it has no jurisdiction over petitioner's case per F.R.Cv.P. Rule 12(b)(1).. "[l]ack of jurisdiction over the subject matter." Petitioner was denied jurisdiction because he allegedly did not exhaust administrative remedies. To the contrary, petitioner not only timely filed an official complaint with the U.S. Office of Special Counsel specifying prohibited personnel practices (facts #10, *supra*), he also filed a timely individual age-discrimination complaint with MSPB after his class was decertified. The latter complaint was denied by an administrative judge who *speculated* that petitioner had "no interest in filing an action". This was an admitted *presumption* by the judge, but a false conclusion contrary to facts presented in petitioner's

2500-word Response To Order To Show Cause, July 8, 2005 (doc. 1, p. 38-43). The Agency's Motion To Dismiss (doc. 27, p. 7, 11) states that MSPB remarked, "[B]utler does not give any explanation for his failure to pursue his rights... or even allege .... his rights were being preserved..." The district court echoed this falsehood. Appen. doc. 14 proves this is clear error.

That denial resulted in EEOC granting petitioner a Right-To-Sue Notice (below) because there were no more administrative options available. The courts claimed it was not really a right to sue (appen. doc.1B, p. 55; appen. doc. 2, p. 61). Petitioner disputes this. He has established a right to invoke Federal jurisdiction by timely filing official documents (below), e.g., the OSC complaint. Petitioner also per class membership filed a Right-of-Action with MSPB on June 8, 2005, that preserved his rights.

In arguing its defense, the Agency cited subjective MSPB opinions about the instant case. The Agency stated in its Motion To Dismiss (court doc. 27, p. 7), "for the first eight years after the RIF, [Butler] did not *wish* to pursue the EEO process at the agency level and did not *wish* to file Board appeals". However, the petitioner's comprehensive Response To Order To Show Cause (*Id.*) defined his "wishes" and intentions; they were quite the opposite. Petitioner filed a complaint, wrote Congress, was a member of the anti-RIF Committee, collected and provided evidence, and kept in touch with the class representative for years.

The Agency has repeatedly used the fact that EEOC denied consideration of appellant's Petition For

Review which was denied for lack of jurisdiction and not on its merits (doc. 27, p. 7-8). The trial court (Order to Dismiss, doc. 59, p. 6) echoed the Agency's "no interest" and denial theme which is not allowed per 5 U.S.C. §7702(b)(2). After MSPB's decision to deny and a petition is filed...

> "[T]he Commission shall, within 30 days after notice of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue."

The Agency has violated this regulation and prejudiced petitioner's case.

II. A right to due process of law must be understood in context of equal-and-fair-treatment issues

The U.S. Constitution operates directly on the Federal government as an employer, i.e., the "no person shall be deprived of due process" clause of the Fifth Amendment (1791) allows petitioner the right to file a timely complaint with the U.S. OSC and later with the U.S. MSPB/EEOC. Equal treatment is implied in that clause (*Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). The Fourteenth Amendment (1868) is the "equal protection" clause stating that no person shall be denied this protective right under its jurisdiction. If the Agency chooses to favor one person or group (under age 40) over another (over age 40) for retention, it must be able to justify it with compelling reasons and interests. In the 1995 RIF, U.S.G.S. violated these two rights by

failing to protect its workforce from discrimination, and allowing a timely-filed complaint to go unheeded. The essence of discrimination is that a person or group has been treated differently, and that is what the Agency did. The discrimination was intentional (see appen. doc. 8, 10, 11, 13) and the petitioner has established a *prima facie* case (court doc. 8, Plaintiff's Motion For Summary Judgment – Default To Provide Answer) under Equal Protection and Due Process clauses per *Washington v. Davis*, 426 U.S. 229 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Civil Service Reform Act Pub. L. No. 95-454 Stat. 111 (1978), 29 C.F.R. §1614.101, and 5 U.S.C. §2302(b) identify illegal practices as <u>any</u> personnel actions based on: race, color, religion, sex, age, national origin, handicapping condition, marital status, political intrusion, obstructing anyone from competing for employment, and giving unauthorized preferential treatment to any employee. They were enacted to... "promote the full realization of equal employment opportunities through a continuing affirmative program in each agency." 29 C.F.R. §1614.102(a)(3) states, " ...all government agencies shall eradicate every form of prejudice or discrimination from the agency's personnel policies, practices, and working conditions." Also, 29 C.F.R. §1614. 102 (c)(5) states that agencies are responsible for assuring that individual complaints are fairly, timely, and thoroughly investigated. Given these concrete mandates, petitioner argues clear error was committed by the trial court in dismissing his case.

When a complainant uses the words: get even, vindictive, unfair, devious, appalled, using politics [in decision-making], victim, targeting employees, mistreatment, this situation smells, and a sad day for Federal employees, the description and tone identify factors associated with prohibited personnel practices per 5 U.S.C. §1221(e)(1). These words encompass a discriminatory situation. The plain meaning of the OSC letter is clear. Abuse of authority and denial of seniority are prohibited in the Federal workforce. Vindictive is defined as retaliating, seeking revenge, and being spiteful. These are functional equivalents to discrimination, and against Federal policy per 29 C.F.R. §1614.103(a) that states any complaints of retaliation are considered complaints of discrimination. Such a claim should have triggered a serious and full response by OSC.

Petitioner's complaint to OSC also stated that he was qualified for positions in his Branch (having been its Deputy and Acting Chief for five years and supervisor of 200 peer employees), and that he had seniority over some non-RIF'ed geologists. OPM RIF guidelines (5 C.F.R. §351.401-.705) indicate petitioner's seniority was wrongfully denied.

The RIF was a brilliant pretext because the budget deficit never materialized and money was being returned (appen. doc. 8, 13). The burden of proof to show it was not a pretext was the Agency's per *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and per *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Complainants have the right to file with an appropriate agency, such as OSC, until such time that MSPB is notified per 5 U.S.C. §7702(f). The trial court stated that the appellant did not timely file his appeal with MSPB in 1995. To the contrary, the petitioner initially filed with OSC which is legally binding until the appeal went to MSPB. Per 5 U.S.C. §7702(a)(1)(B) and §7702(f)...

> "[i]n any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, **the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency**." [emphasis added].

The law is clear. Petitioner has a right to invoke this statute. It is also clear that no time frames are specified. Furthermore, petitioner is exercising his right to invoke the *"absent a showing of good cause"* condition in the RIF Notice (court doc. 1, p. 28A,B) in order to timely file with OSC instead of MSPB. The Agency never denied this condition exists, and never indicated that it was improperly used by petitioner.

OSC is authorized to investigate mismanagement and misconduct, and shall protect Federal employees from prohibited personnel practices. It investigates gross mismanagement, waste of funds, and abuse of authority, or <u>any violation</u> of <u>any law, rule,</u>

or regulation, including any activity relating to political intrusion in personnel decision-making per 5 U.S.C. §1212(a)(2) and (a)(3) and §1214(a)(1)(A) and §1216(a)(4) and 5 C.F.R. §1800.1(a)(12). 5 U.S.C. §1212(a)(3) further regulates that OSC shall review and forward to the Attorney General or an agency head under 5 U.S.C. §1213 disclosures of violations of any law, rule, or regulation, or gross mismanagement or gross waste of funds, or abuse of authority. Petitioner thus appropriately contacted OSC in 1995. The Agency has never offered an answer, other than a standard affirmative-defense denial for petitioner's above-noted claims. Appen. doc. 8 provides public information about the politics and patronage of the U.S.G.S. down-sizing in 1995.

The role of MSPB per 5 U.S.C. §1204 is similar to OSC. The U.S. government website https://e-appeal.mspb.gov/faq.aspx, states:

> "#4. If a personnel action, whether appealable to the Board or not, is taken or about to be taken as a result of a prohibited personnel practice, you may file a complaint with the Office of Special Counsel, asking the Special Counsel to seek corrective action..."
> "#6. Who has the burden of proof in appeals proceedings? The Agency if you show that there was harmful error in the agency's procedures, that the agency decision was based on a prohibited personnel practice, or that the decision was not in accordance with the law."

The following is stated (B.J. Sapin) about Dr. Butler's MSPB appeal in MSPB 295 Opinion and Order, 2006, doc. no. DE-0351-5-0377-I-1:

> "¶12 However, because the record does not establish the date that appellant Throckmorton received the ID denying class certification, **the Board cannot find that the appellant Butler's individual complaint was untimely**. Additionally, even if Butler's complaint was untimely, he must be afforded an opportunity to establish good cause for his untimely filing. ¶13 **In the majority opinion, my colleagues have found that appellant Butler timely filed his appeal..... Accordingly, I would remand Butler's appeal to the Field Office for adjudication on the merits.** ..... ¶ 16 Yet, regardless of the long processing time, the appellants' class EEO complaint was processed according to the regulations that govern the processing of such complaints. EEOC ordered the agency to notify all potential class members of the acceptance of the class complaint and the agency complied. Thus, **the agency and EEOC accorded the class members an expectation that they would continue to be given the benefit of class status, including the tolling of any time limit to file individual complaints or appeals**, until the class complaint was resolved." Also, *id*.... "We hold that the filing of a timely class complaint of discrimination at the agency level extends the time for filing a Board appeal under 5 C.F.R. § 1201.154(b)." [emphasis added].

The Agency states, "[D]r. Butler never timely filed any action alleging discrimination... His letter to the OSC was insufficient." (Defendant's Reply In Support Of Motion To Dismiss, doc. 36, p. 7). Petitioner emphatically disagrees. The Agency shows ignorance here.

The Supreme Court in *Federal Express v. Holowecki, et. al.*, U.S. Supreme Court No. 06-1322 (552 U.S. 2008) decided 2-27-2008, held that because EEOC did not discharge its own administrative duties after accepting a pre-formal complaint against FedEx, and because of the basic concept of fairness, it is allowing the employees' lawsuit to proceed and allowing the suspension of the statute of limitations. The concept of "Manifest Intent" invoked by the Court parallels this instance case. It shows the petitioner's actions, e.g., his OSC letter, were sufficient as an initial claim of discrimination. The Agency's argument of insufficiency fails under the reasoning of *Federal Express v. Holowecki, et. al.* (*Id.*). Petitioner's intent is easily understood and indisputable in his complaint to OSC, and in his writing and meeting with his U.S. Congressman David Skaggs. This action started the ball rolling on a claim of prohibited practices. Petitioner reasonably believed per 3 letters from OSC that he would be interviewed for additional information. Per ADEA, the intake questionnaire filed by FedEx employees in 2001 (*supra*) sufficed as an EEOC charge of discrimination (per 29 U.S.C. §621 *et. seq.*), and the courts treated it as a charge of discrimination even though EEOC did not consider the questionnaire as its official intake form. The Court further noted that although the official "Charge of Discrimination" form was not filed until six months after the

questionnaire, and 2-3 months after the lawsuit was filed, due process was offended. The employees' expectation of tolling was upheld, i.e., the claim was timely filed and the exhaustion of administrative remedies was satisfied. Therefore, because it was the discriminated FedEx employees' *manifest intent* in submitting the questionnaire to activate the administrative process, as judged on its tone and content, the burden of compliance shifted to EEOC to obtain additional information about employee claims. The Court said it is the duty of regulatory agencies to solicit information about claims once the agency has been notified, and whether or not the agency carries out its duties is not within the control of the appellant. The Supreme Court ruled that *substance over form* prevails in determining whether a discriminated employee who has not used the right form can nonetheless express an official complaint in a legally recognizable way. The Court also ruled that nowhere in EEOC rules does it explicitly say that the form "Charge of Discrimination" must be used to file a charge and that no statute comprehensively defines "charge". The Court continues by noting that because the meaning of charge is unclear and not exhaustive, a charge is sufficient if it is a statement that alleges the defendant has engaged or is about to engage in unlawful or discriminatory acts. The Court notes that although regulations identify procedures for filing a charge, they deficiently do not state the full content of a charge. In appellant's similar case, he has plainly shown his intent. The Agency has admitted that petitioner was 51 years old in 1995, i.e., in a protected group (doc. 32, p. 8), and that he claimed to be a victim. The

Agency also admitted petitioner claimed other unlawful practices. Details of victimization were set forth in his August 1995 letter to OSC. Per this ruling, a victim of discrimination does not lose the right to sue.

Petitioner challenges the trial court's judgment that a timely filed complaint to OSC does not satisfy the manifest intent of initiating a formal complaint. The district court's Order To Dismiss (appen. doc. 1b, p. 56) made an incredible statement that ..."[P]laintiff complained in the August 25 letter *only* that his termination was 'a result of difference of opinion with a former office chief' and that he was 'a victim of politics'". "***Only***"? Clearly there was much more. Upon reading this OSC letter, a reasonable person would conclude that the court missed the complaint of prohibited practices (unique CLCs), unfairness, a concern for denial of seniority, and a collapse of civil service merit principles. The Agency also decided that the following four documents (p. 22-32) supporting the appellant's claim are "not sufficient", although the written evidence from the Agency itself empirically indicates otherwise.

In its Order To Dismiss (appen. doc. 1B, p. 56), the Court stated, "an administrative complaint must be sufficiently precise to describe generally the action(s) or practices(s) that form the basis of the complaint." But "precise" and "generally" are oxymoronic. And, per *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed2d 1 (2002), a complaint cannot be dismissed because of the sufficiency of facts presented in the complaint, i.e., a complaint does not need to be a *prima facie* case. Nonetheless, the

petitioner presented a *prima facie* case that the Agency never refuted (court doc. 8).

In downsizing, no federal employee should be denied seniority and retreat rights. Seniority is earned based on many factors including performance, achievement, length of service, and career status. It is a fundamental accrued right per OPM. In the instant case, it was found that a 10-yr.-younger employee with less OPM-calculated seniority and doing the appellant's exact work was saved from the RIF simply by illegally changing a CLC (disparate treatment). This was a specific intentional act (fact #5, *supra*). Classifying employees to effectuate discrimination, including age, is unlawful by 42 U.S.C. §2000e-2(a)(2) and 29 U.S.C. §623(a)(1) and (a)(2):

> "[I]t shall be unlawful for an employer to limit, segregate, or **classify** his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee..." [emphasis added].

Petitioner found after demographics were analyzed by experts (Prof. Paul Switzer, Statistics Dept., Stanford University), that the petitioner was also a victim of age discrimination (disparate impact). In *Adam et. al. v. Norton*, 9th Cir. Doc. No. 04-17365, N.D. CA No. C-98-2094 CW, the court found that the Agency in the 1995 U.S.G.S. RIF offered special meetings for only the under-40 age group instructing them how to avoid being RIF'ed. This included guidelines on how to re-write their position descriptions with privileged information from the staffing committee. That is

obvious conspicuous disparate impact denying hundreds of older employees equal opportunity.

The Civil Rights Acts of 1866, 1870, 1883 (Pendleton Act), the Lloyd-LaFollette Act of 1912, Title VII Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*, the Civil Service Reform Act of 1978, 5 U.S.C. 2302, and the ADEA of 1967, 29 U.S.C. §633(a) are Federal statues that protected the petitioner and now allow him Federal jurisdiction. These statues are the underpinnings of equal opportunity. They are part of the effort to rid government of the spoils system and bring fairness, merit, and equality to hiring, firing, and personnel decision-making (appen. doc. 7 & 12). They form the implicit "fairness doctrine" of civil service. Title VII prohibits disparate impact against any protected class of Federal workers and prohibits discrimination in <u>all aspects</u> of employment, including employee classification and RIFs. Petitioner's 1995 OSC letter claimed that an abusive newly-devised classification scheme using revised codes specific to the RIF cost him his job. The courts have erroneously never acknowledged that the petitioner claimed prohibited personnel practices and preferential treatment of employees by the Agency.

The 1978 CSRA legislates that merit principles be promoted for Federal workers and it prohibits vindictiveness, discrimination, and influencing personnel actions for politically-motivated reasons. This Act ensures against arbitrary actions and abuses, and it safeguards against political intrusions, such as described by petitioner in 1995 to OSC and to U.S. Congressman David Skaggs (appen. doc. 5). 5

U.S.C.§2301(b)(2) and 5 U.S.C. §2302(b)(10) ban discrimination of all types, charge OSC with investigation, and state that a supervisor cannot obstruct equal access to a position. Supervisor Gary Hill, now a convicted felon, was named in petitioner's 1995 OSC letter (below). Hill's hostile environment and vindictiveness are recorded in appen.doc. 10 & 11. Hill's rampant abuse of authority and discretion violated these statues requiring merit principles. Gary Hill illegally used politics in making personnel decisions. The OSC letter said that Hill and Butler had differences of opinion, and Hill was being vindictive using those differences to color decisions that included RIF'ing petitioner. This was payback for an earlier grievance involving the Agency's misuse of Bureau of Indian Affair's project funds.

Reprisals are prohibited forms of discrimination per *Parnell v. Dept. of the Army*, 58 MSPR 128, 131 (1993). 5 U.S.C. §2302(b) prevents any Federal employee authorized to make any personnel action from injuring the employment prospects or retention of others. *Gomez-Perez v. Potter, Pos-master General*, U.S. Supreme Court (06-1321) decided 5-27-2008, allows Federal employees to bring claims for retaliation. Revenge (unjust separation) has no place in the workplace and petitioner wrote OSC because it has the authority to investigate political intrusion and prohibited practices in RIFs per 5 U.S.C. §1216. The 1883 Pendleton Act abolished the spoils system and it is still a central civil service law. It, "protects Federal employees from dismissal for political reasons." In 5 U.S.C. §2302(c), all agency heads and officials in management are required to: 1) prevent prohibited

personnel practices including reprisal, 2) comply with and enforce civil service laws, rules, and regulations, and 3) ensure in consultation with OSC that Federal employees are informed of their rights and remedies.

Petitioner's seniority was "willfully and illegally obstructed" in violation of 5 U.S.C. 2302(b)(1), (b)(4) and (b)(6). When classification schemes are specifically devised to target employees for adverse actions, an illegal act has occurred. It is a mistake for the trial court to ignore a timely-appealed complaint of an illegal act sent to a Federal investigative agency.

Per 5 C.F.R. §351.505, "each agency shall preserve intact all registers and records relating to an employee for a least one year from the date the employee is issued a specific notice." However, the staffing committee knowingly destroyed evidence used during their deliberations concerning *people* rather than *positions* (see court doc. 48, p. 10-13 for 15 examples). These documents were shredded at the end of meetings using newly purchased shredders (see facts #7, *supra*). This again shows the abusive, corrupt, and criminal nature of the RIF (spoliation). A RIF is designed to eliminate *positions* and is not a pretext to target *people* per *Drake v. U.S. Dept. of Commerce*, 18 MSPR 475 (1983) and *Brodrick v. District of Columbia*, 7 MSPR 203 (1981).

Upon receiving a RIF Notice, petitioner wrote an official response to OSC raising questions about prohibited personnel practices, the improper use of CLCs to selectively target people, denial of seniority, vindictiveness, deviousness, unfairness, and political

decision-making by a supervisor Gary Hill. Age discrimination (disparate impact) was not yet known because the data had not been analyzed by the experts on either side, and standard deviations and probabilities not calculated. Such is the nature of disparate impact – during the train wreck (RIF) each passenger does not know the full extent of damage but collectively they read about it later. This OSC letter follows below (court doc. 1, appen. B, p. 28):

DOCUMENT #1:

UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
Box 25046, M.S. 971
Denver Federal Center
Denver, Colorado 80225

August 25, 1995

Ellen Oskoui
Office of Special Counsel
1730 M. St. NW
Washington, D.C. 20036

Dear Ms. Oskoui:

This letter is in reference to the recent RIF in the Geologic Division of the U.S. Geological Survey. I am one of the many government employees who was terminated and I believe this action was taken as a result of differences of opinion with a former office chief, Mr. Gary Hill, who is now the Chief of Program Planning and Coordination in the Director's Office. For 17.5 yrs. I have worked for the Branch of

Petroleum Geology as a career employee. A copy of my RIF notice/termination letter is attached F.Y.I.

This RIF was not about reducing positions in programs. It was about targeting people for various reasons. My non-RIF'ed colleagues even say that the procedure used to eliminate people was totally unfair. Some positions for the most esoteric research imaginable were saved because of the people involved. I think any outside institution, such as the National Academy of Science, would be appalled at what positions were cut and which were saved.

As you know, employees were given competitive level codes, i.e., each person was in his/her own CLC, so for most, there was no bump-and-retreat privilege. I can identify at least 20 positions on the staffing plan for the Geologic Division that I can <u>easily</u> fill without any retraining. Yet, because I have my very own unique CLC, I can be terminated no questions asked. I have B.S., M.S. and PhD. degrees in geology, have been project chiefs, principal investigator, Deputy Branch Chief for 5 yrs. and Acting Chief, have worked on special high priority projects at the request of the Armed Services Committee of the U.S. Congress, have personal letters from the Dept. of Energy and the Director of the U.S. Geological Survey referencing my excellent work on Federally-owned land and national petroleum assessments, etc., etc. The point I wish to make is that my position and qualifications (documented in my 28-page career record on file with OPM) can easily justify an ability to fill many positions, so the only way to "get even" by a vindictive-

minded person is to cleverly abolish the job defined by the CLC (059), which incidentally, does not correctly describe my current duties. My seniority means absolutely nothing. I am a victim of politics. There is no other logical explanation for what has occurred.

I cannot believe that the Office of Personnel Management has allowed this kind of devious RIF procedure and mistreatment of valued employees to occur. I chose not to work for industry because of my belief in the fairness of the Civil Service system. This is indeed a sad day for all Government employees.

Sincerely,
s/ William C. Butler

-- end document #1 --

The Agency erroneously stated (Motion To Dismiss, court doc. 27, p. 14) that, "Butler's OSC letter is of no import...". The letter speaks for itself and proves otherwise. The petitioner would have embellished the claims of unfairness, getting even, mistreatment, vindictiveness, loss of seniority, improper and abusive use of one-person CLCs, if OSC had interviewed him "in detail" as they had stated (appen. doc. 4).

III. Filing a class complaint suspends the statute of limitations for exhaustion of administrative remedies

Appellant was denied seniority (disparate treatment) as noted in his OSC letter. He later learned after the Agency and other experts in *Adam et. al. v. Norton*, 9th Cir. Doc. No. 04-17365, N.D. CA No. C-98-2094 CW statistically analyzed the demographics of who was RIF'ed that he was also a victim of disparate impact, i.e., in a protected class but whose age put him into the targeted group. It was found to be statistically significant that management "cleaned house" of the over-40 group.

An age-animus atmosphere prevailed in the U.S.G.S. in 1992-95. This was an officially sponsored culture of discrimination. See appen. doc. 10 and 11 for statements made by Office Chief Gary Hill. Hill is quoted as saying, "I want to be able to cherry-pick people for the RIF." Acting Regional Geologist Tom Fouch is on record as saying to the staffing committee, "Give me more than 400 new competitive level codes so everyone has their own." The Director of the Survey, Gordon Eaton, also made ageist remarks about "wanting new blood" and wanting to clean house, and made jokes about how the older employees were like dinosaurs. He did this in formal recorded speeches to his employee audiences at all three GD regions. He circulated flyers on 3-23-1995 with a Gary Larson cartoon showing a young dog saying to his mother, "You gotta help me Mom.... this assignment is due tomorrow and Gramps doesn't understand the new tricks." The cartoon was for those employees who were potentially going to be RIF'ed (court doc. 64, attach. J, p. 61). It was cruel and inappropriate. Eaton's favorite joke was, "What is the difference between Jurassic Park and the Geologic

Division?" The answer he gave was, "One is an amusement park filled with dinosaurs and the other is a movie." These cartoons and jokes showed systematic and symptomatic contempt for merit-based principles, especially for the most senior yet most experienced and respected scientists who fairly earned seniority. Some eminent emeritus scientists, such as Warren Hamilton, resigned in disgust.

The Throckmorton-Nichols case became an age-discrimination case in 2000 on advice of a Federal Judge and the class was eventually certified. The overriding issue for the 74 male and female geologists was age discrimination. Judge R. Taoka ruled that the question of law and fact common to class members predominated over questions affecting individuals (F.R.Civ.P. Rule 23(b)(3). It is recognized that because of the concept of fairness, employees who are "similarly situated" are entitled to similar treatment. *Wilburn v. Dept. of Transportation*, 757 f.2d 260, 262 (Fed. Cir. 1985). District court stated, "[P]laintiff was not similarly situated.... Plaintiff is not a member of that class because he is not female." (appen. doc. 1B, p. 57). Petitioner, however, was a *bona fide* male class member. District Court erred.

In May 2003, the Agency made petitioner a *bona fide* class member in an age-discrimination action and never challenged his inclusion. Petitioner was then bound by its conditions per 29 C.F.R. §1614.204 (c)(3). The Agency argued that appellant was not "similarly situated", but it waited until after he filed a lawsuit in district court in 2007. The Agency argued for dismissal because the petitioner had no right to

"piggyback" his claim with Throckmorton and Nichols because "he was not similarly situated". Petitioner, however, is arguing a class-action right, not the right to "opt-in" to someone else's case. The Agency is confused on the distinction between these two types of actions. Per 29 C.F.R. §1614.204(e), petitioner was ordered to be a class member. The following two letters, plus the Agency's own final investigative report, provide evidence to the contrary of the Agency's allegation of not being "similarly situated". All three Agency documents appear prior to case dismissal in the appellant's pleadings (court doc. 48, p. 62-66, attach. A, B, C, of June 1, 2007).

DOCUMENT #2:

J. Michael Bieszad
Chief Employment Relations Sec.
U.S. Geological Survey, CR
Bldg 53, Box 25046, MS 609
Denver, CO 80225-0046

William Butler
31951 Lodgepole Drive
Evergreen, CO 80439

Dear Mr. Butler:

On May 6, 2003, the Equal Opportunity Commission's Office of the Federal Operations reversed a decision issued by EEOC Administrative Judge Ronald Taoka dated March 23, 2000 and certified an equal opportunity class complaint filed by Constance Throckmorton (Class Agent). The class includes

geologists in the Denver commuting area, 40 years of age and over, who were separated or downgraded pursuant to the October 1995 Reduction-In-Force. The decision requires the United States Geological Survey, U.S. Department of the Interior, to notify potential class members of the class certification. You are hereby notified that you have been identified as a potential class member in accordance with 29 C.F.R. §1614.204(e).

Information concerning the specifics of this class complaint is contained in the attachments to this letter. Should you have any questions about this matter please contact the class agent, Constance Throckmorton.

Sincerely,

s/ Michael Bieszad

Enclosures:
Notice to Potential Class Member
Decision re: Class Action Appeal No. 01A03994, Hearing No. 320-AO-8196X

-- end Agency document #2--

DOCUMENT #3:

UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
RESTON, Virginia 20192

In Reply Refer To:
Mail Stop 602 December 4, 2003

To: Potential Class Member [William Butler]
From: Patricia S. Hagan, Acting Chief
Office of Equal Opportunity
Subject: Constance K. Throckmorton, Class Agent v. Gale Norton, Secretary, Department of the Interior, Appeal No. 01A030994

This is to advise you that on November 24, 2003, The Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations issued a denial of request for [Agency's] reconsideration in the appeal of the above matter and certified a class of geologists 40 years of age and over in the Denver, CO, area who were involuntarily separated or down-graded due to the October 1995 Reduction-In-Force (RIF). The decision requires the United States Geological Survey (USGS), U.S. Department of the Interior, to notify potential class members of the acceptance of the class complaint in accordance with 29 C.F.R. §1614.204(e).

A copy of the November 24, 2003, EEOC decision certifying the above described class is provided herewith for your information. If you have any questions concerning this notice or need further information, you must contact the class representative at the following address:
Constance K. Throckmorton
1 Big Cone Spruce
Littleton, Colorado 80127
Phone: 303-972-8620

Email: cthrockmorton@msn.com
cc: Constance K. Throckmorton, Class Agent
E. Melodee Stith, Director, Office for Equal Opportunity
Patricia S. Hagan, Acting Chief, Office of Equal Opportunity
S. Kaye Cook, Chief, Office of Personnel
Debra Charette, Assist. Solicitor, Personnel Litigation & Civil Rights, Division of General Law, Office of the Solicitor, DOI

--end OEO document #3 --

In 2004 the Agency contracted an investigation into age discrimination among RIF'ed employees. Its final report is 15 volumes (≈7,500 pages). The first 1½ pages are reproduced below. Note that this class is Throckmorton, Nichols, and others. The petitioner was a member of "and others".

DOCUMENT #4:

UNITED STATES GEOLOGICAL SURVEY

REPORT OF INVESTIGATION ON CLASS COMPLAINT

I. DESCRIPTION OF CLASS COMPLAINT

Names of Complainants: Constance Throckmorton and Kathryn Nichols, *et. al*, Class Agents, Case Number CA-WGS-00-001

Title and Series of Complainants' and Class Members' Positions: Geologists, GS-1350

Name and Location of Agency and Unit Involved in Class Complaint: Central Region, Geologic Division, U.S. Geological Survey, Denver, Colorado

Date of Alleged Discrimination: October 1995

Kind of Discrimination Alleged: Age, over 40

Nature of Action, Decision or Condition Giving Rise to Class Complaint: Reduction in Force

II. DESCRIPTION OF INVESTIGATION

Identity of Investigator: Molly Smith, DSZ Associates, Inc., 1730 N. Lynn St., Ste. 601, Arlington, VA 22209

Identity of Statistician: Dr. Barry Zamoff, DSZ & Associates, Inc., 1730 N. Lynn St., Ste. 601, Arlington, VA 22209

Date Report of Investigation Submitted to Agency: September 28, 2004

Places of Investigation: Reston, VA and Denver, CO

Dates of Investigation: February 21, 2004 – July 15, 2004

Method of Investigation: On-site and Telephone Interviews; Interrogatories

III. DESCRIPTION OF BASES AND ISSUES IN CLASS COMPLAINT

Whether the United States Geological Survey discrim-

inated against Geologists, 40 years of age or older, on the basis of their age, in the Denver, CO, commuting area, who were either separated or downgraded as a result of the reduction in force in October 1995.

Complainants assert both disparate treatment and disparate impact. They assert that the Competitive Level Code (CLC) was purposely misused to displace those over 40 and that the result of the RIF disparately impacted employees over 40.

Disparate treatment based on age: *Hazen Paper Company v. Biggins*, 113 S.Ct. 1701 (1993); *O'Connor v. Consolidated Caterers Corp.*. 571 U.S. 308 (1996).

Disparate impact: *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989); *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

--end cover page of Agency document #4 –

The Agency's report includes discovery from at least 66 class-member complainants, including appellant, whose interrogatories (appen. doc. 5 & 9) appear as Exhibit D-13 and are titled at p. 11:

> "Affidavit of William Butler: (DOB 1/7/44), **Class Member**, former Geologist, GS 1350-13, Office of Energy and Marine Geology, GD, CR, USGS, dated May 25, 2004." [emphasis added].

Note that the appellant is once again clearly identified as a class member. A class is certified when

there is numerosity, commonality, typicality, and adequacy. A class issue is superior to individual litigation when these conditions are met (F.R.Cv.P. Rule 23(b)(3)) which states,

> "[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy".

Petitioner was in a class that was intending to litigate age discrimination, and he was given the option of either cooperating and accepting the requirements or opting out. The appellant did not opt out. Therefore, because the class was a single common issue, logic demands that petitioner was similarly situated. It follows, there is clear error for the district court to state that petitioner was not similarly situated.

The conclusive information in the above four documents was submitted repeatedly to the district and appellate courts. It shows the appellant was similarly situated as the other 74 geologist class members who were both male and female in the Central Region and who were over 40 complaining of age discrimination. A class action suspends the running of the statute of limitations for all putative members of the class until class certification is decided per *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). When the class was decertified in May 2005 due to the doctrine of *res judicata*, petitioner timely filed an individual action per *Nelson v. County of Allegheny*, 60 F.3d 1010 (3rd Cir. 1995). The latter states that from

the date the class action is filed until class certification is decided, the running of limitations is suspended. If a class certification is denied, the limitations period begins to run again, and class members have the remainder of the period to file their own actions. Thus, petitioner was protected against a limitations defense. A suspension of the running of the limitations period applies even if the class certification motion is denied for lack of commonality or typicality per *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983).

Appellants are entitled (5 U.S.C. §7701(a)(1)) to a MSPB hearing which petitioner was never granted after making the request four times in writing in a 19-month period. Per 5 U.S.C. §7703(a)(1), the petitioner has Federal jurisdiction wherein, "any employee adversely affected or aggrieved by a final order or decision of MSPB may obtain judicial review...", and 5 C.F.R. 1201.157 gives the appellant the right to sue in U.S. District Court. It states that any final decision of MSPB under 5 U.S.C. §7702 will notify the appellant of his or her right to petition the EEOC, or to file a civil action in an appropriate United States district court. Appellant Butler did both. 5 U.S.C. §7702 involves any type of discrimination covered by CRA and ADEA. The administrative judge failed to docket the individual class members when the class was decertified per 29 C.F.R. §1614.109(a) and §1614.204(k). Also, 5 U.S.C. §7702(e)(3) guarantees nothing will affect the right to trial *de novo* under Title VII CRA and ADEA. 'Per 42 U.S.C. §2000e-16(c),

> "...an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title in which the head of the department, agency, or unit, as appropriate, shall be the defendant."

Per 5 U.S.C. §1221(a), an employee has the Right Of Action with respect to any personnel action taken against such employee as a result of a prohibited personnel practice described in 5 U.S.C. §2302(b)(8) to seek corrective action from MSPB which the appellant did seek. This statute relates to, "a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, or an abuse of authority..." And, per 5 U.S.C. §1221(b) this right of action (*supra*) may not be construed to prohibit any employee from seeking corrective action from the MSPB before seeking corrective action from the Office of Special Counsel. Thus, petitioner has again shown he was entitled to file a complaint with OSC on Aug. 25, 1995. Complaints are legal if filed in letter format, such as the petitioner's. The letter was followed by a Right of Action to MSPB (court doc. 64, p. 45-45b) timely filed after class decertification.

<u>The EEOC OFO sent petitioner a Notice of Right-to-Sue dated Dec. 6, 2006</u> (see court doc. 1, cover page + appen. A, p. 23-24), received Dec. 14, 2006. The first paragraph of p. 2 follows:

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0900)

> This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, within thirty (30) calendar days of the date that you receive this decision.
>
> FOR THE COMMISSION:
> s/ Carlton M. Hadden, Director
> Office of Federal Operations
>
> -- end EEOC's right-to-sue letter excerpt--

That statement is self-explanatory and unambiguous regarding the appellant's exhaustion of administrative remedies. However, the district court made this statement in the Order To Dismiss (doc. 59, IV B, p. 8)... "[P]laintiff provides no authority for his contentions that either the EEOC's notice of right to sue or his communication with his Congressman demonstrate exhaustion of administrative remedies." What does "final decision" and "no further right of administrative appeal" and "you have the right to file a civil action" mean if not its literal obviousness? The petitioner never claimed, as the Agency states, that a personal meeting and letter to one's Congressman exhausted remedies, but they do show intent. On the other hand, the petitioner has argued from statutes, e.g., 5 U.S.C. §7702(f) allowing timely filing

with OSC (court doc. 30, Plaintiff's Opposition To Motion To Dismiss, p. 7-8). It is cited 9 times in various pleadings in the appeals court docketing statement at 133, 142, 163, 195, 263, 308, 341, 342, 360.

Petitioner has also argued from case precedents (see court doc. 1, Complaint, #11, p. 42)....

> "[W]hen a case is pending, the timeliness for filing an appeal is extended (*American Pipe & Construction v. Utah*, 414 U.S. 538 (1974) and 5 C.F.R. 1201.27(a) present a clear statement of this timing issue: 'When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.'"

Petitioner is allowed per 5 C.F.R. §1201.27(a) to file an individual action when the class was decertified. *Scott v. Dept. of Treasury*, 1 MSPR 42 45 (1996). These authorities have never been rebutted. Instead, the Agency has argued false premises of the petitioner "piggybacking" other actions, and weakly argued subjective "insufficiencies" of the complaint.

Petitioner has exhausted administrative remedies. In *American Pipe & Construction Co. v. Utah (supra)*, the Supreme Court stated the rule that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554, 94 S.Ct. at 766; *Andrews v. Orr*, 851 F.2d

146, 48 FEP 643 (6th Cir. 1988). Later, the Supreme Court applied this rule in a Title VII case and clarified the duration and effect of the tolling. *Crown, Cork & Seal Co. v. Parker (supra)*; There the court stated, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354, 103 S.Ct. at 2397-98. [emphasis added].

It is well established that in a class action it is not necessary for all class members to have exhausted administrative remedies; it is sufficient if such remedies are exhausted by one named representative. *Valentino v. United States Postal Service*, 511 F.Supp. 917, 25 FEP 24 (D.D.C. 1977), aff.'d, 674 F.2d 56, 218 U.S. App. D.C. 213, 28 FEP 593 (D.C. Cir. 1982); *Beeman v. Middendorf*, 425 F.Supp. 713, 18 FEP 778 (D.D.C. 1977); *Barrett v. Civil Service Commission*, 69 F.R.D. 544, 11 FEP 1089 (D.D.C. 1975); *Chisholm v. United States Postal Service*, 665 F.2d 482, 27 FEP 425 (4th Cir. 1981); *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 15 FEP 1115 (5th Cir. 1977), cert. denied, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977); *Ellis v. Naval Air Network Facility*, 404 F.Supp. 377, 386, 391 (N.D. Cal. 1975), rev'd on other grounds, 608 F.2d 1308 (9th Cir. 1979). The 10th Circuit District Court itself has held that a named plaintiff is entitled to pursue individual relief if class certification is denied. See *Monreal v. Potter*, 367 F.3d 1224, 93 FEP 1562 (10th Cir. 2004). A named plaintiff, such as the petitioner, who has exhausted class administrative remedies is deemed to have exhausted individual administrative

remedies as well, and thus may pursue individual relief if class certification is denied.

The Agency concedes that on Nov. 10, 1995, two geologists, Constance Throckmorton and Kathryn Nichols, who were separated from the U.S.G.S. in the same RIF as the petitioner, timely initiated EEO counseling. On Jan. 18, 2000, Throckmorton and Nichols filed a formal complaint and sought class certification. EEOC certified the class as males and females over age 40 and remanded the case for a final agency decision. Thus, according to the district court's findings, the Dept. of the Interior had notice that plaintiffs who were subjected to this RIF in Oct. 1995, timely filed their complaint. Petitioner Butler clearly falls within the definition of a male class member over age 40 who was RIF'ed in 1995.

On Feb. 15, 2005, The Agency, not surprisingly, issued its final decision with a finding of "no discrimination". Actually, their own 2004 report shows gross discrimination (fact #13, 14, *supra*). Throckmorton filed an appeal to MSPB and sought class certification. It was denied on May 2, 2005 and the petitioner filed a timely appeal to MSPB. Filing requirements in regulation containing limitations period for individual administrative employment discrimination complaints are not jurisdictional and are subject to equitable tolling. Civil Rights Act of 1964, §701 *et seq.*, 42 U.S.C. §2000e *et seq.* In *Andrews v. Orr* (*supra*) the court found the plaintiffs presented a case for application of equitable tolling when they reasonably relied on a pending class action in delaying filing their individual complaint, acted with diligence upon being inform-

ed of their need to file a complaint and established that there was no prejudice to the defendant because of the class action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726, 80 L.Ed.2d 196 (1984). In *Boddy v. Dean*, 821 F.2d 346, 45 FEP 586 (6th Cir. 1987) the court ruled that filing requirements of 29 C.F.R. §613.214(a) are not jurisdictional and that equitable tolling was justified because the plaintiffs reasonably believed that an earlier class action would preserve their rights. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), the Supreme Court held that the charge-filing time requirements are not jurisdictional prerequisites and are "subject to waiver, estoppel and equitable tolling." This argument was made repeatedly (F.R.Cv.P. Rule60 doc. 64, p. 15-27).

In the instant case, petitioner reasonably believed that he was a member of a class action and promptly filed an individual Right-Of-Action upon learning from the class representative that the class certification had been reversed. The administrative judge did not inform the petitioner that he had a right to file individually.

In a disparate impact (group statistical evidence) ADEA age discrimination action, the Agency has the burden of proof and persuasion in an affirmative defense against discrimination. 29 U.S.C. §623(f)(1). Yet, it has never denied the appellant's claim with evidence, and has relied only on subject matter jurisdiction as a defense. See *Meacham v. Knolls Atomic Power Laboratory, aka KAPL, Inc., et. al.* (*supra*). If the Agency did not believe the appellant

should be a class member, they had time to challenge it; however, they cannot now un-ring that bell.

Petitioner has been denied due process of law based on his timely 1995 complaint to OSC in violation of 5 U.S.C. §7702(f), and also on his timely individual Right-of-Action appeal to MSPB/EEOC after the age-discrimination class was decertified. But, per Title 29 §1614.407, the U.S. District Court is authorized to hear Federal employment claims.

> "[A] claimant who has filed an individual complaint, an agent who has filed a class complaint or a complainant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court."

WHY THE SUPREME COURT SHOULD HEAR THIS CASE

The U.S. Supreme Court should hear this case because the Federal workforce is large, and the questions presented concerning Constitutional issues of due process and equal protection apply. The rights of all Federal employees are potentially affected by the outcome. The Court can make an important policy statement about whether management of a Federal agency can hijack a RIF, i.e., develop the rules then run the RIF independently of OPM. Arbitrary reclassification to effectuate separations in a RIF clearly violates ADEA. Scientists, who are temporarily acting as managers, cannot turn a RIF into a "*Lord of the Flies*" scenario and target people. If this case is heard, the Court can provide input to discourage

further abuses. Future litigants will benefit by a ruling of expected equality and due process.

There are multiple issues of wrongful separation in this case: 1) manipulation of a RIF to favor one group over another, 2) proof required that a RIF is really necessary, 3) whether there is truly a Federal duty of good faith and fair dealings in Agency-run RIFs, 4) do Federal employees really have accrued seniority after achieving career status after their first three years, and 5) what constitutes "sufficiency" for a complaint of discrimination. The Court would be expressing an opinion on an important issue: How corrupt can a Federal RIF be before it is stopped?

A few abusive managers with contempt for merit principles cannot be allowed to target people. They must be held to the concept that people fill Federal positions, and it is the position that is either needed or eliminated per a legitimate unbiased staffing plan. Lists of names cannot be drawn up targeting employees for separation months *before* a staffing plan of positions is in place. Can a legitimate RIF adversely affect 784 non-managers and <u>zero</u> managers?

Hearing this case will strengthen and clarify Federal employee rights in class actions and in actions where EEOC has issued Right-To-Sue Notices. The role of the investigative U.S. Office of Special Counsel can be defined with respect to an intake of complaints compared to MSPB. Can OSC drop a complaint without a follow-up interview with the complainant?

A hearing will strengthen merit-based principles and show that *equal employment opportunity* is alive and not just a slogan. Bogus retention registers (1-person CLC's) and politically-motivated pay-backs by supervisors are wrong, and if this case is heard, future RIFs will benefit from the Court's opinion. The case provides an excellent opportunity to clarify and resolve similar adverse-action issues. Also, the lower courts need guidance on the rights of *bona fide* class members filing individual actions when a class is decertified. In sum, this case is awash in important principles that affect a huge Federal workforce.

CONCLUSION

Although the central issue in this case is procedural (jurisdiction), it is mixed with several significant substantive issues. Jurisdiction and due process must be viewed in the context of the preservation of fairness and the expectation of preserving rights based on timely-filed complaints. Jurisdiction is tied to administrative remedies and remedies are tied to factual matters. Matters which have nothing to do with job performance, such as politics and vindictively targeting people, cannot trump merit and the doctrine of fairness and equality in employment.

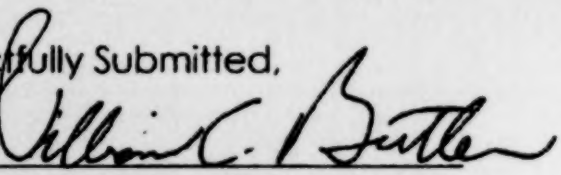
Petitioner has shown that there was an environment of hostility toward older employees and unfairness associated with the 1995 U.S.G.S. RIF. There is irrefutable evidence of this age-animus culture, particularly shown by the abusive experimental CLC methodology. It denied: seniority, bump-&-retreat rights, and the right to compete for 100 positions immediately

added back and filled by employees under age 40 without competition after the RIF. The statistical-disparity proof of this discrimination is overwhelmingly in favor of petitioner.

Equality in Federal employment exists, but this case shows the doctrine occasionally needs reinforcement. Petitioner has attempted in good faith to bring the inequality to the forefront in both the OSC letter and as a member of a certified class action claiming age discrimination. Petitioner's rights did not just evaporate when the class was decertified. Thus, he seeks to invoke this well-established "equality doctrine" having exhausted all administrative remedies per EEOC's Notice Of Right-To-Sue. The case was dismissed on a *subjective* technicality – whether or not the petitioner exhausted his administrative remedies. Fairness says a Right-To-Sue letter answers this and it should be honored. Due process is requested from the U.S. District Court because it has jurisdiction for the types of prohibited practices described, and which were sufficiently made known to U.S. Office of Special Counsel and to the Agency through the class action.

This petition should be granted to reverse a clear error; jurisdiction can be established, and the case can finally be tried on its objective merits.

Respectfully Submitted,

s/ 

William C. Butler, petitioner *pro se*
November 26, 2008

APPENDIX DOCUMENT 1A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-00055-MJW-CBS

WILLIAM C. BUTLER,
Plaintiff,

v.

DIRK KEMPTHORNE, Sec., U.S. Dept. of the Interior,
Defendant.

JUDGMENT

Pursuant to and in accordance with the Order on Defendant's Motion to Dismiss (document 59) entered by the Honorable Michael J. Watanabe, United States Magistrate Judge on August 24, 2007, incorporated herein by reference, it is ORDERED that the Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1), which was filed on April 3, 2007 (document 27) is granted. It is FURTHER ORDERED that judgment is entered in favor of Kirk Kempthorne, Secretary, U.S. Department of the Interior, and against William C. Butler. It is FURTHER ORDERED that the Complaint and this civil action are dismissed with prejudice.

Dated at Denver, Colorado this 24th day of Aug. 2007

FOR THE COURT:
GREGORY C. LANGHAM, CLERK

By: s/ Chris Vagner
Chris Vagner
Chief Deputy Clerk

APPENDIX DOCUMENT 1B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-00055-MJW-CBS

WILLIAM C. BUTLER,
Plaintiff,

v.

DIRK KEMPTHORNE, Sec., U.S. Dept. of the Interior,
Defendant.

ORDER ON
DEFENDANT'S MOTION TO DISMISS (Docket No. 27)

MICHAEL J. WATANABE
United States Magistrate Judge

This case is before this Court pursuant to the Order Of Reference Pursuant to 28 U.S.C. § 636(c) filed on March 28, 2007, and the parties' unanimous consent to disposition of this action by a United States Magistrate Judge.

I. PLAINTIFF'S ALLEGATIONS AND CLAIM

Plaintiff, a geologist, claims that Defendant discriminated against him based on his age when he was separated from the United States Geological Survey

(USGS), an agency within the United States Department of the Interior, in October 1995 during a reduction in force (RIF). Plaintiff alleges that he was employed by the USGS for more than seventeen years when, on August 14, 1995, he received a notice stating that his position would be eliminated on October 14, 1995. On or about October 14, 1995, the USGS implemented the RIF and Plaintiff was separated from the USGS. Plaintiff asserts that he was fifty-one years old at the time of his separation. Plaintiff's claim of age discrimination is asserted pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

II. PENDING MOTION

On April 3, 2007, Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) (docket no. 27) was filed. Defendant argues that the Court lacks subject matter jurisdiction because Plaintiff failed to exhaust administrative remedies. On April 6, 2007, Plaintiff filed his response to the motion to dismiss. On April 27, 2007, Defendant filed a reply and on April 30, 2007, Plaintiff filed an amended response. The Court has carefully considered the motion to dismiss, the responses, the reply thereto, and the applicable case law and Federal Rules of Civil Procedure. The Court now being fully informed enters the following order.

III. STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows the Court to dismiss an action if the Court lacks subject matter jurisdiction. Because federal

courts are courts of limited jurisdiction, there is a presumption against the existence of jurisdiction and "[t]he party invoking the jurisdiction of the court has the duty to establish that federal jurisdiction does exist." Basso v. Utah Power & Light Co., 495 F. 2d 906, 909 (10th Cir. 1974); see also United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994) (noting that "[t]he party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the court's jurisdiction.").

Motions to dismiss a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) generally take one of two forms. See Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

> First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true. Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. (internal citations omitted). The Court must convert a Rule 12(b)(1) motion to dismiss into a summary judgment motion if "resolution of the jurisdictional question is intertwined with the merits of the case." Id. at 1003. "The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case." Id.

Defendant's motion to dismiss for lack of subject matter jurisdiction in the instant action falls into the second category because Defendant is challenging the factual basis for jurisdiction and not the sufficiency of the complaint. The Court also finds that the issue of exhaustion of administrative remedies is not intertwined with the merits of the case. Therefore, the Court will consider the documents submitted by the parties that are relevant to the exhaustion issue and will not convert Defendant's motion into a motion for summary judgment.

IV. DISCUSSION

A. Factual Background. As noted above, Plaintiff was notified of the pending RIF in an August 14, 1995, letter. A copy of the RIF notice is attached to the Complaint at Appendix B, pages 28A-28B. The RIF notice advised Plaintiff that he could challenge his separation by appealing to the Merit Systems Protection Board (MSPB) within thirty days after the effective date of the RIF. On August 25, 1995, Plaintiff wrote a letter to the Office of Special Counsel of the Department of the Interior (OSC) challenging his pending separation. A copy of Plaintiff's August 25

letter to the OSC is attached to the Complaint at appendix B, page 28. Plaintiff complained in the August 25 letter that "[t]his RIF was not about reducing positions in programs. It was about targeting people for various reasons." (Compl. at App. B, p.28.) Plaintiff specifically asserted that his termination was "a result of differences of opinion with a former office chief" and that he was "a victim of politics." (Id.) Plaintiff did not file an appeal to the MSPB within thirty days after the effective date of the RIF.

Two other geologists, Candace Throckmorton and Kathryn Nichols, who also were separated from the USGS in the same RIF, initiated counseling with an equal employment opportunity (EEO) counselor on November 10, 1995. According to the report filed by the EEO counselor, a copy of which is attached to Defendant's motion to dismiss as Exhibit A-3, Throckmorton and Nichols

> alleged that they and all other female Geologists . . . age 40 or older (as of October 15, 1995) in the Denver commuting area who were separated or changed to a lower grade as a result of the U.S. Geological Survey (USGS) reduction-in-force (RIF) effected on October 14, 1995, were discriminated against illegally by disparate impact as compared to men similarly situated.

(Def.'s Mot. to Dismiss at Ex. A-3, p.2.)

On January 18, 2000, Throckmorton and Nichols filed a formal complaint regarding the October 1995 RIF. A copy of the January 18 formal complaint is attached to Defendant's Motion to Dismiss as Exhibit A-

1. Throckmorton and Nichols sought class certification for their complaint and alleged that "[t]he class consists of all female geologists . . ., age 40 or older (as of October 15, 1995) in the Denver commuting area who were involuntarily separated or downgraded in a discriminatory manner through those RIF actions." (Def.'s Mot. to Dismiss at Ex. A-1, p.2.) An administrative judge initially denied class certification. However, in March 2003, the Equal Employment Opportunity Commission (EEOC) reversed the administrative judge's class-certification decision and ordered that the complaint be allowed to proceed on a class basis. The EEOC determined that the appropriate class included both male and female geologists over age 40 who were affected adversely by the RIF. The EEOC also remanded the matter to the USGS for a final agency decision on the issue of whether the class was subjected to discrimination on the basis of age in the RIF. On February 15, 2005, the agency issued a final agency decision finding no discrimination.

Pursuant to the relevant regulations, Throckmorton then filed an appeal of the final agency decision to the MSPB and again sought class certification. On May 2, 2005, the administrative judge assigned to the case denied the request for class certification.

On June 8, 2005, Plaintiff filed an appeal to the MSPB challenging the 1995 RIF. On June 24, 2005, an administrative judge issued an order to show cause to Plaintiff regarding the timeliness of his appeal. On July 12, 2005, the administrative judge dismissed Plaintiff's appeal as untimely. Plaintiff then filed a

petition for review of the administrative judge's decision. The MSPB consolidated Plaintiff's petition for review with that of Mary Carey. On September 27, 2006, the MSPB issued its final decision denying the consolidated petitions for review and upholding the determinations that Plaintiff's and Carey's appeals were untimely. A copy of the MSPB's September 27 order is attached to Defendant's Motion to Dismiss as Exhibit A-2. The MSPB specifically considered whether Plaintiff and Carey "intended to preserve their right to file Board appeals but delayed doing so because they reasonably believed that Throckmorton and Nichols were pursuing EEO counseling and a discrimination claim on their behalf." (Def.'s Mot. to Dismiss at Ex. A-2, p.9.) The MSPB concluded "[t]hat is not what happened, however." (Id.) The MSPB specifically stated that neither Carey nor Butler had

> shown or even alleged, that as to the first 8 years in the 10-year period between the RIF and their filing of these appeals, they delayed filing with the Board based on a belief that their rights were being preserved because others were pursuing relief on their behalf at the agency level and before the EEOC.

(Id. at 10.) The MSPB ultimately concluded that "for the first 8 years after the RIF, [Carey and Butler] did not wish to pursue the EEO process at the agency level and did not wish to file Board appeals." (Id. at 11.)

Plaintiff appealed the MSPB's September 2006 decision to the EEOC. On December 14, 2006, the EEOC determined that it lacked jurisdiction and denied consideration of Plaintiff's appeal because

the MSPB had dismissed Plaintiff's appeal as untimely and did not consider the merits of his claim of discrimination. The EEOC notified Plaintiff in its December 14 decision of his right to seek judicial review. Plaintiff then filed the instant action claiming that Defendant eliminated Plaintiff's position with the USGS on the basis of Plaintiff's age in violation of the ADEA.

B. Legal Analysis. The ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." Lorillard v. Pons, 434 U.S. 575, 577 (1978) (citing 29 U.S.C. § 623(a)). Without addressing the merits of Plaintiff's age discrimination claim, Defendant argues that this action must be dismissed for lack of subject matter jurisdiction because Plaintiff failed to exhaust administrative remedies. "A Plaintiff's exhaustion of his or her administrative remedies is a jurisdictional prerequisite to suit under the ADEA." Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1317 (10th Cir. 2005).

In general, an individual must file a charge with the EEOC prior to filing suit pursuant to the ADEA so that the agency "can attempt to eliminate the alleged unlawful practice through informal methods." Lorillard, 434 U.S. at 580; see also 29 U.S.C. § 623(d); Shikles, 426 F.3d at 1308. After allowing the EEOC sixty days to attempt to conciliate the alleged unlawful practice, and assuming the EEOC has not filed suit on the individual's behalf, the individual may file suit. See Shikles, 426 F.3d at 1308 (citing 29 U.S.C. § 623(c) & (d)). "To the extent that the charge filing requirements of the ADEA and Title VII are similar, courts must construe them consistently." Id. at 1309.

The issue of exhaustion of administrative remedies is somewhat more complicated in the instant action because Plaintiff's claim of age discrimination stems from an employment action that also was appealable to the MSPB. This is known as a mixed case. See 29 C.F.R. § 1614.302(a). An aggrieved employee in a mixed case has the option of filing an administrative complaint with the EEOC or filing an appeal with the MSPB, but not both. See 29 C.F.R. § 1614(b). If the employee initially files an appeal with the MSPB and ultimately disagrees with the final decision of the MSPB, the employee then may petition the EEOC for review of the allegedly discriminatory action. See 5 U.S.C. § 7702(b)(1).

Defendant argues that Plaintiff failed to exhaust administrative remedies because Plaintiff never filed a timely appeal to the MSPB and he never filed a complaint of discrimination with the EEOC. Plaintiff, on the other hand, argues that this action should not be dismissed for failure to exhaust administrative remedies because the EEOC issued to him a notice of right to sue, because he filed a timely challenge to the RIF in August 1995 when he sent a letter to the OSC complaining about the RIF, because he wrote to and spoke with his Congressman in 1995 regarding the RIF, and because the administrative proceedings initiated by Throckmorton and Nichols satisfy the requirement that administrative remedies be exhausted. Plaintiff provides no authority for his contentions that either the EEOC's notice of right to sue or his communication with his Congressman demonstrate exhaustion of administrative remedies.

Therefore, the Court finds that neither the EEOC's notice of right to sue nor Plaintiff's communication with his Congressman provide any basis to deny Defendant's motion to dismiss.

Plaintiff's August 25, 1995, letter to the OSC also does not demonstrate that he has exhausted administrative remedies because Plaintiff never alleged in that letter that he was discriminated against on the basis of his age. A relevant regulation regarding cases of employment discrimination under Title VII provides that an administrative complaint "must be sufficiently precise . . . to describe generally the action(s) or practice(s) that form the basis of the complaint." 29 C.F.R. § 1614.106(c). As noted above, Plaintiff complained in the August 25 letter only that his termination was "a result of differences of opinion with a former office chief" and that he was "a victim of politics." (Compl. at App. B, p.28.) Nothing in Plaintiff's August 25 letter alerted the USGS to the claim Plaintiff is asserting in this action that he was terminated because of his age. Therefore, the Court finds that Plaintiff's August 25 letter does not satisfy the exhaustion requirement.

Plaintiff's argument that the administrative proceedings initiated by Throckmorton and Nichols satisfy the requirement that administrative remedies be exhausted also lacks merit.

> Federal courts universally hold that an individual who has not filed an administrative charge can opt-in to a suit filed by any similarly situated plaintiff under certain conditions. This so-called 'single-filing rule' generally allows a

> plaintiff, who did not file an EEOC charge, to piggyback on the EEOC complaint filed by another person who is similarly situated. The policy behind the single filing rule is that it would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. As long as the EEOC and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no injustice or contravention of congressional intent occurs by allowing piggybacking.

Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1110 (10th Cir. 2001) (citations and internal quotation marks omitted). Plaintiff was not similarly situated to Throckmorton and Nichols because they complained of discrimination against female geologists over age forty. Plaintiff is not a member of that class because he is not female. Therefore, the administrative proceedings initiated by Throckmorton and Nichols did not make the USGS or the EEOC aware of the nature of Plaintiff's allegations of age discrimination.

Furthermore, the fact that the EEOC in 2003 expanded the Throckmorton and Nichols class to include all geologists over the age of forty does not demonstrate that Plaintiff exhausted administrative remedies. "[G]overnment 'agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint.'" Belgrave v. Pena, 254 F.3d 384, 387 (2d Cir. 2001) (quoting Bowden v. United States, 106 F.3d 433, 438

(D.C. Cir. 1997)). Plaintiff's claim of age discrimination was not included in the administrative proceedings timely filed by Throckmorton and Nichols in 1995. In fact, as the MSPB found in its September 2006 decision, Plaintiff did not wish to pursue administrative remedies for the first eight years after the RIF was implemented in 1995. Therefore, consideration of Plaintiff's claim in 2003 does not excuse his failure to exhaust administrative remedies.

WHEREFORE, for the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) (docket no. 27) is granted. This case is dismissed with prejudice.

Dated: August 24, 2007
Denver, Colorado
S/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

APPENDIX DOCUMENT 2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM C. BUTLER,
Plaintiff-Appellant,

v.

DIRK KEMPTHORNE, Secretary,
U.S. Department of the Interior,
Defendant-Appellee

No. 07-1490
(D.C. No. 1:07-CV-55-MJW-CBS, D. Colo.)

ORDER AND JUDGMENT*

Before **KELLY**, **McKAY**, and **BRISCOE**, Circuit Judges

Pro se plaintiff William C. Butler appeals from the dismissal of his employment case for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).[1] He also challenges the denial of his Fed.R.Civ.P. 59(e) motion to alter or amend judgment and the denial

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* (see next page).

[1] All district court proceedings were conducted before a magistrate judge with the consent of the parties. See 28 USC § 636(c)(1).

of his Fed.R.Civ.P. 60(b) motion for relief from judgment order.

The district court set forth a detailed summary of the pertinent facts and we need not restate them here. R.Doc. 59 at 4-7. suffice it to say that plaintiff, a geologist, filed this action in 2007 alleging that his former employer, the United States Geological Survey (USGS) (an agency within the United States Department of Interior (DOI)), violated 29 U.S.C. §633a, a provision of the Age Discrimination in Employment Act (ADEA), when it eliminated his position on the basis of his age during an October 1995 reduction in force. Defendant countered with a Rule 12(b)(1) motion to dismiss, asserting that the district court lacked subject matter jurisdiction to consider plaintiff's complaint because he had failed to exhaust his administrative remedies before filing suit. That is, plaintiff never filed a timely appeal to the Merit Systems Protection Board (MSPB) and he never filed a complaint with the Equal Employment Opportunity Commission (EEOC).

The district court agreed with defendant. Specif-

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*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R. App.P. 34(a)(2); 10th Cir. R. 34.1(G). the case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estopel. It may be cited, however, for its persuasive value consistent with Fed. R.App.P. 32.1 and 10th Cir. R. 32.1.

ically, it concluded that the EEOC's right to sue letter did not "demonstrate exhaustion of administrative remedies" and therefore did not "provide any basis to deny Defendant's motion to dismiss." R.Doc. 59 at 8-9. Plaintiff's August 1995 letter to the Office of Special Counsel (OSC) for the DOI also failed to demonstrate that plaintiff had exhausted his administrative remedies because he "never alleged in that letter that he was discriminated against on the basis of his age." *Id.* at 9. Nor could plaintiff rely on the administrative proceeding initiated by two women to satisfy the exhaustion requirement because he "was not similarly situated to" them since "they complained of discrimination against female geologists over age forty." *Id.* at 10. Moreover, the fact that the EEOC expanded the women's "class to include all geologists over the age of forty [did] not demonstrate that Plaintiff exhausted administrative remedies." *Id.* The district court therefore granted defendant's Rule 12(b)(1) motion and entered judgment. Plaintiff then filed a "Motion to Alter Order on Defendant's Motion to Dismiss and Judgment for Dismissal," that the district construed as a Fed.R.Civ.P. 59(e) motion, and denied. R.Doc. 63. Finally, plaintiff filed a ;motion for relief from judgment or order pursuant to Fed.R.Civ.P. 60(b), that the district court also denied. R.Doc. 65. This appeal followed. Liberally construing plaintiff's pro se appellate filings, *Cummings v. Evans*, 161 F.3d 610 (10th Cir. 1998), he asserts – as far as we can discern – that the district court erred by dismissing his case and by denying his post-judgment motions because: (1) the EEOC's right to sue letter demonstrated that he had exhausted his administrative remedies, (2) his

August 1995 letter to the OSC served to exhaust his administrative remedies, (3) the court should have employed equitable tolling, and (4) he was "part of a class complaint that was timely filed." And as such, "there was no requirement for him to exhaust any remedies or file anything." Aplt. Opening Br. At 18.

Our jurisdiction arises under 28 USC § 1291. We review de novo a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and review findings of jurisdictional facts for clear error. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1294-95 (10th Cir. 2003). "Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (quotation omitted). We review the district court's denial of a Rule 59(e) motion for an abuse of discretion. See *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1275 (10th Cir. 2005); *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (identifying "[g]rounds warranting a motion to reconsider"). We review the district court's denial of a Rule 60(b) motion for an abuse of discretion as well, keeping in mind "that Rule 60(b) relief is extraordinary and may be granted only in exceptional circumstances." *Beugler v. Burlington N. & Santa Fe Ry. Co.*, 490 F.3d 1224, 1229 (10th Cir. 2007) (quotation omitted).

Having reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standards, we conclude that plaintiff has failed to identify any reversible error in this case or demon-

strate that the district court abused its discretion in denying his post-judgment motions. This case is a "mixed case" which affords plaintiff the option of filing an appeal with the MSPB or an administrative complaint with the EEOC. Here, plaintiff did neither. Plaintiff cannot rely on his 1995 letter because it did not allege or complain about age discrimination. Obviously, he was not similarly situated to them. If he had been similarly situated, he could have relied on their administrative exhaustion, and the later expansion of their class action claims to include sex and age discrimination. Plaintiff's age discrimination claim, however, was unexhausted and did not qualify as a claim that other class members had exhausted. Plaintiff also contends that he need not exhaust if another class member has exhausted. But he cites no authority for this concept where his claim was not the same as the claim exhausted by the initial class members. We therefore AFFIRM the judgment of the district court for the same reasons set forth in its order on defendant's motion to dismiss and AFFIRM the district court's orders denying plaintiff's Rule 59(e) and Rule 60(b) motions.

Entered for the Court
Mary Beck Briscoe
Circuit Judge

APPENDIX DOCUMENT 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM C. BUTLER,
Plaintiff-Appellant,

v.

DIRK KEMPTHORNE, Secretary,
U.S. Department of the Interior,
Defendant-Appellee

No. 07-1490
(D.C. No. 1:07-CV-55-MJW-CBS, D. Colo.)

ORDER

Before **KELLY**, **McKAY**, and **BRISCOE**, Circuit Judges

Appellant's petition for rehearing is denied.

Entered for the Court,

s/ Elisabeth A. Shumaker, Clerk
ELISABETH A. SHUMAKER, Clerk
[filed September 3, 2008]

APPENDIX DOCUMENT 4

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

November 30, 1995

Mr. William C. Butler
31951 Lodgepole Drive
Evergreen, CO 80439-6656

Re: OSC File No. MA-95-2067

Dear Mr. Butler:

In accordance with 5 U.S.C. §1214(a)(1)(C)(i) the Office of Special Counsel is required to advise you of the status of your complaint within 90 days after our initial notice to you that we had received your complaint. This letter is to advise you that this matter has been assigned to me for review. The Office of Special Counsel receives a large number of complaints and it is our general practice to review such matters in the order in which they are received. If I have not already done so, I may be contacting you in the near future to discuss your complaint with you in detail. If you have any questions concerning this matter please call me at (202) 653-7188 or on our toll-free number at 1-800-872-9855.

Sincerely,
s/ J. Sandra Thomas
Complaints Examiner

APPENDIX DOCUMENT 5

31951 Lodgepole Dr.
Evergreen, CO. 80439
October 3, 1995

Representative David Skaggs
1124 Longworth House Office Bldg.
Washington, D.C. 20515

Dear Representative Skaggs:

On August 14, 1995, the Geologic Division of the U.S. Geological Survey notified some of its employees that they were being terminated, i.e., the Division had engineered a RIF (reduction in force) of about 540 federal employees. I am sure that you are aware of all the details. I was one of those RIF'ed employees. I had 17.5 yrs. of professional service in the Branch of Petroleum Geology, having been a Deputy Branch Chief, project supervisor and research geologist. I do not mind being RIF'ed if indeed the Federal Government wishes to downsize according to Civil Service guidelines. However, the reduction was manipulated by individuals who wished to target people rather than positions. How can Civil Service reconcile the fact that talented, good people were placed in their own competitive level codes so their jobs could be eliminated?

Take myself for example... (1) I have BS, MS, and PhD degrees in geology with many types of honors and awards, (2) I put in fully satisfactory work according to my supervisors, (3) I have a multitude of inter-

disciplinary talents, and (4) I have authored several papers at the request of the U.S. Armed Services Committee. But, the message I am receiving is that I am not qualified to do any other job in an organization of thousands of people because I am the only person in my competitive level code. Where are my "bump and retreat" rights? The Office of Personnel Management should be ashamed to allow all these excellent people be fired because some ambitious power-seekers in the Survey wanted to "clean house" for whatever reasons. We had been told for nearly a year that cuts could happen equally across the board, i.e., to managers/ supervisors and the rest of the workforce. You get one guess as to how many managers and supervisors were cut! [none].

My purpose in writing is just to let you know that both my RIF'ed and unRIF'ed colleagues think this situation smells. We all came to Civil Service because of its reputation of being fair. What happened?

Sincerely,
s/ William C. Butler

APPENDIX DOCUMENT 6

The following article appeared in the Rocky Mountain News, Denver, CO, June 16, 1997, front page. Parts indicated by ≡ are redacted for brevity.

FEDS' BONUSES RAISE IRE
Fired Workers Say Geological Survey's Incentive Program Is A Slap In The Face: Some USGS Workers Got Bonuses After Layoffs
By Burt Hubbard *RMN staff writer*

A federal agency of Colorado paid about $275,000 in bonuses last year after laying off 167 people. Nationwide, the geologic division of the U.S. Geological Survey handed out more than $800,000 in incentive awards in the year after a major reduction in staff that initially saw about 500 people lose their jobs. Most of the money was paid near the end of the fiscal year. Workers who lost their jobs said the bonuses are a slap in the face. They had to fire in the course of the year 16 or 17 extra people to get the money to pay out bonuses. ≡ One geologist in Colorado got five bonuses totaling more than $5,000, and several others got two bonuses within days that exceeded $5,000. ≡ The bonuses became an issue after the layoffs in the geologic division in October 1995 reduced staffing to about 1,600 nationwide and 500 in the central region headquarters in Lakewood. That set off a bitter battle that led to appeals of many of the dismissals. A list of the bonuses issued for the year ending Sept. 30, 1996 was obtained through the Freedom of Information Act. ≡ In the 1996 fiscal year, about $830,000 was handed out, with 70% coming in the fiscal year's final two months, August

and September. In the Lakewood office about 90% of the $275,000 came in the same two months. About one-third of the employees received the incentives. That led [RIF'ed employees] to suspect that the agency was freely spending money it had saved from eliminating jobs. ≡ Employees are limited to no more than two bonuses in each category during the year, but Plasker said five or six nationwide, including two in Colorado, exceeded the limit. A Lakewood geologist received five bonuses totaling more than $5,000. Four of them were issued in August and September. In Colorado, a geologist got $2,182 on Sept. 19 and $3,182 more the next day. A geochemist received $3,182 on Sept. 19 and four days later received $2,727 more. ≡ Howard Wilshire, who was initially laid off from the California office and later reinstated, said a letter from Gene Whitney, when he was head of one of the division's teams, shows the agency was in a rush to spend its excess money. "We have a problem. It's a GOOD problem, but a problem nevertheless" began the memo by Whitney written on Aug. 1, 1996. "According to our books, the Central Energy Team still has an enormous amount of UNSPENT OE (operating expenses) in projects. Although we may be happy because we're rich, the problem is that it may not be humanly possible (within our purchasing system) to spend that money between now and the end of the fiscal year, Sept. 30th." The memo then urges staffers to "PLEASE SUBMIT YOUR REQUISITIONS ASAP." They're dumping the money," Wilshire said. ≡

APPENDIX DOCUMENT 7

The following article appeared in the Rocky Mountain News, Denver, CO, Dec. 9, 1997, over two years after the U.S.G.S. RIF.

'Designer Downsizing' Has Given Federal Managers New Tool To Ax Employees

In a recent letter on federal work force diversity, Janice Lachance, director of the U.S. Office of Personnel Management, said the current administration "proudly claims credit for downsizing the federal work force in a manner that does not adversely affect any (minority) group."

Lachance's perception of the truth of federal downsizing would be greatly enhanced if she would review what occurred in 1995 at the Interior Department's U.S. Geological Survey with the firing of 550 employees, one-quarter of the Geologic Division's work force. The agency's own documents presented at just concluded public hearings revealed that professional women were released, reassigned or demoted at a rate 70 percent greater than their male counterparts. Older scientists were released at a greater approaching 100 percent greater than their younger counterparts and, for good measure, every scientist who had a pending Equal Employment Opportunity complaint was separated. Would it be surprising that every manger at the USGS was retained?

The agency ignored traditional Civil Service regulations and created a system in which individual

employees could be targeted. Nearly every employee was classified into a unique position and deemed to have no interchangeable skills or duties with any other employee, no matter how trivial the tasks. By failure to correct or even acknowledge this injustice, OPM now appears to support this "designer downsizing" so federal managers have a tool to "reinvent" the patronage system. It took a public hearing to reveal the facts.

Perhaps the administration is secretly proud of this atrocity and will continue the cover-up through legal battles and doublespeak. The government has already spent over $10 million in defense of this devastation of diversity. Taxpayers deserve better.

G. Michael Reimer, Golden, CO

APPENDIX DOCUMENT 8

The following article appeared in the Boulder Weekly newspaper, Boulder, CO, Sept. 26, 1996, p. 10-12. Parts identified by ≡ are redacted for brevity.

BAD SCIENCE
Politics And Patronage Reign In Downsizing: Reinventing Government The Geological Survey Way – Reward Your Friends And Punish Your Enemies

By Greg Campbell

President Clinton is making big headlines lately bragging about his success in shrinking the size of government. Last Saturday's *Rocky Mountain News* quoted Clinton saying, "In everything from hiring people to buying things, we've eliminated double talk and bureaucracy." This would be wonderful news if it were true. Unfortunately, in the case of the work-force reduction at the USGS, it hardly is.

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According to geological scientists who lost their jobs as a result of a reduction in force, USGS middle-managers used the opportunity to downsize as an excuse to purge the agency of their enemies. Rather than creating a leaner, more efficient organization that costs the taxpayers less money through the skillful whittling and revamping of critical positions, critics contend that the USGS has lost some of its most valuable scientific minds to the whims of vindictive managers. "One point I want to make is that none of the people who were RIFed are against the idea of government downsizing," says one scientist. "Our question is this: is what happened at

the USGS the proper way to downsize?" In the end, according to a variety of sources and a number of appeals that have been filed by about 80 fired employees with an administrative court, most of the USGS scientists who could be thought of by management as trouble-makers – those who filed harassment or discrimination complaints, those who disagreed scientifically with their supervisors, or simply those who happened to be female – found themselves out of a job due to the liberties some managers took with the regulations overseeing RIF's. And, they claim, almost all of those same managers used their positions and their knowledge of the future USGS staffing plan to make sure they still had jobs, regardless of whether or not they were the most qualified for them. The result of the RIF, in the words of world-renown retired USGS scientist Warren Hamilton, who resigned his retirement fellowship in disgust over the entire affair, is an earth science organization that "was superb. It will come out of this mediocre or worse. And it likely won't end up saving the taxpayers a dime."

PURGING THE HERETICS

When the USGS went through its RIF in October of last year, 550 employees were separated in Denver, Menlo Park, CA, and Reston, VA The Denver office lost 167 employees. "We knew early on that something wasn't right," one scientist told Boulder Weekly, who, like many others contacted for this story, requested anonymity. "The first clue was the single person competitive levels." Certainly, the way the branch chiefs, office chiefs and other middle managers in charge of orchestrating the RIF pooled the

positions for competition is one of the most contentious aspects of the entire reorganization. In order to prevent the very thing that the appellants say happened – the arbitrary firing of employees for vindictive reasons – all RIFs in any agency of the government must abide by federal RIF regulations, laws that specify how a RIF is to be implemented so it's a fair process that retains the most qualified people.

According to the law, as an agency prepares for downsizing, management must make an inventory of all the position in the agency and pool together the ones which are reasonably interchangeable into a competitive level. That way, if a position is eliminated, the individual who held that position is not necessarily lost too. Instead, they compete with others in their competitive level for the remaining positions, not unlike a game of musical chairs. In the end, the most qualified individuals are staffed in the positions that remain whether or not they held a position that was eliminated during the downsizing. This way a vengeful manager can't simply eliminate a job to get rid of an employee she dislikes. At least in theory.

But according to many of those fired, the USGS managers charged with creating and approving the competitive levels found a way around the facet of the law by crafting position descriptions so specific that they couldn't possible be interchanged with another position. Out of about 300 pre-RIF positions, there were 295 competitive levels (98.5% reclassified). In other words, if someone's position was eliminated, there was no one to compete against

since they were the only person in their competitive level. If it were indeed musical chairs, there would only be one person playing and there would be nowhere to sit once the music stopped. By eliminating specific positions, USGS managers were inevitably eliminating individuals.

"The whole thing was flaunting civil service regulations and the civil procedure by targeting individuals," says Hamilton, who believes that the process was so befouled by a tone of retaliation and favoritism that the Merit Systems Protection Board, the administrative court hearing the appellants' complaints, will be forced to overturn the RIF. There are two reasons to think it could be overturned. Number one, the management clearly circumvented the legalities by classifying everyone as unique and the other is that if it is not overturned then the word goes out to all other agency managers that they can circumvent the agency regulations."

In fact, the RIF was so suspect that it caught the attention of Rep. John Mica(R-FL), the chairman of the House Subcommittee on Civil Service, Committee on Government Reform and Oversight, who began an investigation into the downsizing. Ed Lynch, the senior research director of the subcommittee says, "What's troubling is the fact that there are so many different unique competitive levels in this case. We're dealing with a situation in this particular RIF where apparently as much as 90 percent of the geologists in the division were treated as some kind of specialized employee. When you're

talking about Ph.D. geologists, you're talking about people who are sufficiently skilled that they can pick up different kinds of research assignments or modify their previous assignments and adapt somewhat to the workplace. For some reason, the USGS appears to have had a lesser evaluation of the talents of its people. "Basically, the single person competitive levels are something that you have to see as an effort to avoid responsibility for the decisions that were made and basically an effort on the part of the survey to distance itself from the consequences of some of its decisions." But Tom Fouch, a USGS manager now and at the time of the RIF, says that the competitive levels were justified due to the highly specialized nature of the individual positions.

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This information comes as a surprise to Dr. Karen Wenrich who is one of the RIFed scientists appealing her dismissal. Wenrich thinks she was targeted for firing due to the reputation she earned as a trouble-maker in conjunction with the successful EEO complaint she filed against her superior in 1991. Ironically, the basis of the suit was discrimination.

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The congressional subcommittee conferred with the Office of Personnel Management, the civil service oversight organization that actually wrote the RIF rules, about whether or not the USGS could legally choose to put its people into so narrow a competitive level. OPM Director James King responded that "The agency has no latitude to elect a policy of narrow rather than broad competitive levels... the competition level is based solely on the position of

record (a scientist's job assignment), not personal qualifications."

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The result of placing over 90% of the geologists into unique competitive levels was that the protections and the measures of fairness afforded by the federal RIF regulations were stripped away. And once the competitive levels were established, critics say it was just like shooting fish in a barrel for management.

A CASE IN POINT

Dr. Howard Wilshire has no doubt that he was RIFed for his role in stopping the creation of a hazardous waste dump in the deserts of California that he thought would contaminate the Colorado River and, subsequently, the water supply of Los Angeles and San Diego. "I've been a trouble maker for a long time before this, though," he says. "I blew the whistle on what I thought were phony estimates on undiscovered mineral deposits on public lands and things like pipelines and mining and grazing and you name it: any land-use issue that I thought was out of control across the Western arid lands. In the scientific community, my work was respected," he continues, "and I got consistently high ratings from my peers, so the problems were all political. What toes I trod on – the Bureau of Land Management, the Forestry Service – those are institutions that have regulatory powers and don't want facts that interfere with their decisions on land use. So I was a red flag to them. There is no question in my mind that the RIF action was against me for retaliation."

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According to Wenrich, Wilshire's case isn't unique: "Branch chiefs, assistant branch chiefs, the chief geologist... they issued their vendettas against people who've spoken out against them scientifically and the implications for that are very far-reaching," she says. Even more unsettling are the allegations that the vendettas didn't end with professional disagreements. According to several appellants, every scientist with a pending EEO complaint against a superior was RIFed, as was a scientist who filed a grievance against a boss.

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CONFLICT OF INTEREST

The branch chiefs, office chiefs and other middle managers who gave final approval over the creation of the single person competitive levels were also in charge of formulating the USGS staffing plan that would be adopted after the RIF. Since the positions on the staffing plans were as specific as the position descriptions for the existing jobs, filling the new slots was as easy as connecting the dots. And this, the complainants allege, is the flip side of the retaliation coin: buddies of the managers had position descriptions that matched up with new jobs after the RIF. And since that buddy was most likely alone in his competitive level, there was no one to challenge him for it. According to literature distributed by the fired scientists, 11 managers' spouses retained their jobs or were found new positions.

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Since the managers were the ones who developed the staffing plan in the first place, they had firsthand knowledge of which positions were going to be eliminated and which were going to be retained or

created. Of the 75 various managers in the USGS, 74 found a position in the staffing plan. The one who didn't, not surprisingly, had an EEO case pending against the USGS and was an assistant. The managers have done little to try to deny that they had an unfair advantage over other scientists competing for science positions, even though some of the methods by which they obtained their new positions border on fraud. For example, Christine Turner, the branch chief who fired Wenrich, obtained a position in the new staffing plan working on a coal energy project even though she had no prior experience working with coal. Turner's boss, Energy Program Coordinator David Houseknecht, was questioned before the MSPB in Denver about this suspicious appointment. After all, weren't the employees supposed to be judged for placement in the staffing plan based on their previous experience?

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"In my opinion, it is unreasonable for an organization to ask its managers to implement a reduction in force and then say, 'Oh, by the way, fire yourselves while you're at it'" Houseknecht says. Whether the courts agree with him or not remains to be seen, but this type of thinking seems to be in direct contradiction to the intentions of the federal RIF laws. As noted in the Guide to Merit System Protection Board Law and Practice, "[T]he linchpin of federal personnel management is fairness, i.e., employees who are similarly situated are entitled to similar treatment. The notion of fairness is implicit in RIF regulations. Regulations reflect the congressional concern for fairness, limiting an agency's discretion in filling a vacancy in a RIF." Or as one anonymous scientist put it: "if

Christine Turner is able to create her own position description for a spot on the staffing plan, then 550 other people should be able to do it too."

MONEY MATTERS

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According to testimony by Chief Geologist Leahy, the RIF was financially successful for the agency in that it saved the USGS over $40 million in operating expenses. Leahy was asked by attorney Chisolm if there were any programs that had excess funding as a result of the $40 million saved in expenses. Leahy answered, "For fiscal year '96? It's not over yet." Indeed, it's not. Less than a month after this observation, a general memo was circulated to USGS program ;managers that was almost giddy in its tone: "Listen up folks. We have a problem. It's a GOOD problem, but a problem nonetheless. According to our books, the Central Energy Team still has an enormous amount of UNSPENT OPERATING EXPENSES in projects. This is not money in my pocket, it's money in YOUR pocket. Although we may be happy because we're rich, the problem is that it may not be humanly possible within our purchasing system to spend that money between now and the end of the fiscal year." The memo went on to beg everyone to submit purchase requisitions as early as possible as the administrators charged with filling the orders were expected to be "working overtime trying to keep up." Though it may not seem "humanly possible" to spend all the overage according to the author of the memo, there is a strong suspicion that the managers will rise to the task.

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APPENDIX DOCUMENT 9

The following cover letter is the Authorization To Investigate sent to petitioner Butler, a *bona fide* member of the age-discrimination class and party to the action. It is followed by some of the 15 interrogative questions sent to the petitioner from the Agency through DSZ & Associates in May 2004. The answers are included.

AUTHORIZATION TO INVESTIGATE

This is to certify that Molly Smith and Barry Zamoff, investigators employed by Delaney, Siegel, Zorn & Associates (DSZ) and engaged by the U.S. Geological Survey Office of Equal Opportunity, have the authority to investigate all aspects of the complaint of: discrimination based on age filed by Constance Throckmorton, Class Complaint CA-WGS-00-011, to require employees of this Bureau to cooperate with the investigator in the conduct of the investigation, and to require employees of this Bureau having knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence. This investigator is also authorized access to any document of, or in, the U.S. Geological Survey in connection with the performance of these official duties. Use of such documents shall be in accordance with applicable laws and regulations.

s/ Sherman Scott Jackson — Feb. 10, 2004
Formal Complaints Manager — Date of Authorization
Office of Equal Opportunity

INTERROGATORY QUESTIONS

Q #1-6: [standard background information already presented in the petition for writ of certiorari]

Q #7: Did anyone in management personally give you reasons for the elimination or downgrade of your position?
A: Yes... Impending budget cuts and financial disaster for the US geological survey unless the budget for salaries was reduced. The term "contract on America" was used repeatedly to make employees believe that our budget was going to be slashed and that management was just doing its job to comply with what the politicians wanted. However, the budget was not cut. No reason was given as required in the RIF Notice.

Q #8: Do you have reason to believe that the reduction in force was not required for fiscal reasons? If so, state your reasons.
A: Yes. There were several articles written in Denver, CO by major newspapers providing insight into what had happened during and after the massive reduction in force. These articles showed that it was management's design to terminate non-managers and then give themselves pay raises. After the RIF, memos apparently surfaced from management telling the non-RIF'ed workers to use up all the extra money by buying new computers and other equipment and to write up employees for merit pay increases. Not being a Federal employee at that time, I did not see the memos but I did hear about

them from friends who still worked at the USGS. One of the newspaper articles was titled: Feds 'Demoted' to Higher Pay', Rocky Mountain News, 3-12-1998, front page headline.

Q #9: Do you have reason to believe that staffing plans were formulated so as to target those over age forty for downgrades or separation? If so, state your reasons.
A: Yes. ABSOLUTELY!! Because that is indeed what happened. All one has to do is look at the statistics. The "older" employees generally have higher salaries than the "newbies" and what better way to trim the budget than target the higher-salaried employees. I attended the RIF meetings for RIF'ed employees and the employees in the audience were the "oldies", such as myself. Also, there is only one reason to get all employees to re-write their position descriptions just prior to the RIF – put each employee into a separate competitive level category and then take away the position. It is now so obvious and blatant, it is disgusting.

Q #10: Do you have reason to believe that competitive level codes were set or used to target those over age forty for downgrades or separation? If so, state your reasons.
A: Yes. Because, once again, that is exactly what happened. The whole process of putting people into their own competitive code with no one else was an obvious setup. The rumors in the office were that managers were protecting their own jobs and screwing their colleagues. Civil Service shamefully went along with this deceit and no one that I know,

including myself, was then able to "bump" less-senior employees. There was not a single position in my branch that I could not have competently filled with my background of PhD geologist, eleven-year college professor, and five years supervising the research in my branch as Deputy Branch Chief. The employees that I saw in the RIF meetings seemed to have a commonality, and that commonality was most had filed complaints against their branch or supervisor for whatever reason, such as discrimination, poor performance rating that was not justified, etc. In my case, I had filed a grievance because after being a deputy Branch Chief, I saw Bureau of Indian Affairs money not being used properly and my then Branch Chief did not appreciate me making a big deal of it.

Q #11: Do you have reason to believe that the process of adding back positions after the initial position elimination decisions were made was designed or used to target those under age forty for "add backs"? If so, state your reasons.
A: Yes. I knew many Survey employees in my 17.5 years there. I also knew some of the people who got their jobs back. How can one not wonder at why jobs were being advertised after the RIF when the Survey was suppose to be down-sizing?

Q #12: Has any manager involved in the RIF decisions made any statement which you believe is evidence of his/her intent to discriminate on the basis of age? If so, provide the name of the manager, the statement made, the context in which the statement was made, and the date.

A: I do remember the general gist of ageist comments [dinosaur and old-dog jokes] that were made in branch and office meetings by Tom Ahlbrandt and Tom Fouch. I am a prolific note-taker and thus I may have recorded some of these; however, I have 15 filing cabinets of my USGS research and administrative documents in storage and it will take time to access this information. Specifics from 10 yrs. ago cannot be remembered without reviewing my notes.

Q #13: Do you have any evidence that any of the managers involved in the RIF decisions were aware of your age at the time they participated in RIF decisions? If you do, provide the evidence with as much specificity as possible.
A: Yes. I came to the USGS in 1978 from a distinguished graduate student and teaching career as an Associate Professor. By 1995 my colleagues had to know that in order to do this, I had to be at least 50 years old. Managers clever enough to orchestrate the RIF were clever enough to know my age. My official Career Record which was updated annually, contained the date I graduated from high school (1962) which meant that I was 18 (+ or – a year) and hence born in 1944. When you work with people for almost 18 years, they generally know how old you are; in fact, we routinely celebrated everyone's birthday in the branch on a per month basis. These gatherings included the normal lunch-hour office party with jokes about how old people are getting and a "roasting" of the guest of honor.

Q #14: Is there any other age-related reason why you believe the decision to separate you or

downgrade you as part of the reduction in force was discriminatory? If there is, describe that reason with as much specificity as possible.
A: My job was eliminated allegedly to save money. That was well known and publicized. The deceptive scheme that wasn't publicized to the victims of the RIF was that the older the terminated employee was, the more money the Government would save, via making it impossible for the RIF'ed employee to realize a Federal retirement.

Q #15: Have you been a party to other complaints or legal actions regarding the 1995 RIF? If so, describe the current status of the other complaint or action.
A: Other than writing letters to Office of Special Counsel and to my U.S. Congressman, no. My letters asked why Civil Service was not protecting my job after 17.5 years of career competitive service. My performance ratings had always been fully satisfactory to outstanding. [n.b.: the petitioner's lawsuit/Complaint was filed in U.S. District Court after the 2003 class was decertified under the doctrine of *res judicata* in May 2005].

APPENDIX DOCUMENT 10

G. Michael Reimer
RR-103 75-6081 Alii Drive
Kailua-Kona, HI 96740
August 16, 2008

Dr. William C. Butler
31951 Lodgepole Drive
Evergreen, CO 80439-6656

Dear Dr. Butler,

I recall that after giving a state-of-the-office address to Denver in 1994, the Office of Energy Chief, Dr. Gary Hill, talked to various small groups of individuals. This was in the first floor, north-end conference rooms of Building 25 on the Denver Federal Center, Denver, CO. I do not recall the exact time but that should be obtainable from records of conference room reservations. At that time, concern was high on whether or not the Geologic Division would participate in a reduction in force (RIF) if the budget of the U.S. Geological Survey was cut. It appeared that not only would the Geologic Division be involved but that would be the only Division involved.

Very few rank and file individuals knew anything about a RIF process and we were just learning the terminology. The general knowledge was that the system for separation was similar to that of most labor forces, particularly unionized groups for which last hired would be first fired. The Geologic Division had

a rather skewed age distribution with most employees over age 40 and with 20 or more years of service.

I was part of a group of three individuals to whom Dr. Gary Hill told the Geologic Division had been working on a means of separating individuals regardless of their tenure, a means to specifically target individuals or small groups of individuals. The other individuals of that group were Dr. Karen Wenrich and Dr. James Otton, all members of the Branch of Sedimentary Processes in Denver and all engaged in the study of naturally-occurring radioactive materials. Dr. Hill stated that there might be some individuals caught that would be separated in order to get rid of some targets, but they could be rehired later. We were of course somewhat flabbergasted at the glee he took in talking about the method of classifying positions into as narrow of categories as possible and that an individual in Reston Personnel Office had been devising this system for years. It was this cavalierness and arrogance that made this small group meeting significant enough to remember. It was clear to us, even though we were novices in the terminology of RIF procedures, that this targeting, the capability of management to target employees for either retention or separation was a prohibited personnel practice. We believed that management had to turn over the RIF operations to the Personnel Office who would run an objective RIF following proper guidelines.

Dr. Wenrich and I were separated from employment. Dr. Otton, who has less tenure than either Wenrich or I, was retained. At the time of the RIF, I was a GS-14

Research Geologist 1350 with a PhD in geology from the University of Pennsylvania. I prevailed in my appeal at the MSPB level and was reinstated. The ruling was that the position descriptions of various individuals were similar enough that with my tenure seniority, I should not have been separated. I held both competitive level, bump and retreat rights over other employees. None of the individuals over whom I had seniority were separated after my reinstatement.

An analysis of the post-RIF scenario clearly shows that Dr. Hill's remarks presaged what hap happened. Discovery documents reveal that Division Management retained almost complete control over the RIF process, not only instructing classification panels they convened but they oversaw Branch management develop retention registers to give to Personnel. They categorized positions with random code assignments for individuals that opened the door for abuse. Over 97 % of scientists were placed into single position classifications. There was distinct age animus prevalent in the Geologic Division at the time of the RIF. This is a fact that was recognized by a California Court hearing claims from the Menlo Park, CA RIF, and older individuals were indeed targeted. Further, hiring back some separated individuals did occur. And finally, some position descriptions of individuals were rewritten by upper level management so that they corresponded to qualifications on add-back lists and were thus retained.

This recollection to the best of my knowledge is an accurate representation of the statements and

attitude of upper level management. They fully gave the appearance they were going to be given a one-shot opportunity to separate individuals and were going to use it as specifically as they could.

Sincerely,
s/ G. Michael Reimer, Ph.D. Geologist

APPENDIX DOCUMENT 11

Memorandum

Subject: Recalled 1992 conversation with Gary Hill about proposed personnel practices and attending circumstances.

In 1992 I was an employee of the U.S. Geological Survey, Office of Energy and Marine Geology, Branch of Sedimentary Processes, stationed in Denver, CO. One day during the spring of 1992 Mr. Gary Hill, along with one or two colleagues, came into the Building 25 cafeteria where I was having lunch. As he was going to his table he detoured to where I was eating and said in a loud voice, "We've got you all, now. We got the OK from DOI lawyers for the classification. We can fire anyone we want to." I expressed doubt and stated that his ideas, besides being contemptuous of merit-system principles in my mind, remained actually illegal under Civil Service statutes. The conversation then ended.

The classification Hill was speaking of was an attempt to classify each and every federal employee (under his jurisdiction as Chief, Office of Energy and Marine Geology) into unique position-descriptions so that each employee could be terminated individually without benefit of seniority, veteran's preferences, or other protections of the Civil Services Protection Act. Mr. Hill and I had discussed this potential reclassify-cation several times previously along with Mr. John McGurk, a personnel specialist, who had suggested the scheme. I had raised possible legal arguments against the procedure at those discussions arousing

some antipathy to my views with both Mr. Hill and Mr. McGurk. I interpreted the tone of his comments to me in Denver as an expression of that antipathy.

These are my clearest recollections of the 1992 conversation with Mr. Gary Hill.

s/ Dr. Joseph T. O'Connor
Bailey, CO 80421
August 26, 2008
Telephone: 303-816-9718

APPENDIX DOCUMENT 12

The 1995 RIF began like this.... Federal Employees News Digest, Reston, VA, published the following article on Aug. 14, 1995, (v. 45, n. 2, p. 4), on the day that about 800 RIF Notices were served in the U.S.G.S.

"RIF Rigging Alleged at Geological Survey

The House Civil Service Subcommittee, which is monitoring reductions in force throughout government, is focusing on the U.S. Geological Survey, which is being accused by some of its employees of designing its RIF to protect certain individuals while exposing others to the ax.

The Survey, world renowned for its Earth science research work, wants to get rid of about a quarter of its 2200 geologic division staff, firing about 500-600 and downgrading another 700. It has fashioned the RIF (notices are expected to go ut today) so that many employees find themselves in "one-man" competitive areas.

The RIF will include 200 firings in each of three locations – Reston, Va., Menlo Park, Calif., and Denver. Many of those targeted are involved in the division's core work: geology, chemistry, geophysics, and so on. Some USGS employees believe that by making the competitive areas so specific, veterans preference, tenure, length of service and job success will be circumvented as retention pluses. They also charge that the buddy system is protecting certain individuals and that nepotism also may be a factor."

APPENDIX DOCUMENT 13

This confidential memo was sent to Chief Geologist Patrick Leahy by six Program Coordinators (who helped engineer the RIF) after ≈800 employees were separated, downgraded, transferred, or otherwise adversely affected by a massive RIF under pretext of budget cuts. The ≡ symbol indicates redacted material for brevity. Underlining added for emphasis.

UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
Reston, VA 22092
November 1, 1995

MEMORANDUM

To: Chief Geologist
From: Acting Program Coordinators
s/ 6 sets of initials
Subject: Decisions affecting Geologic Division science programs

During the past two weeks we have been informed, commonly through hallway conversations or unexpected memos, about decisions that have significant impacts on the science programs that we are charged to coordinate. These include:
≡ [a list of cost issues]

These decisions are directly contradictory to many of the principles under which we operated during the planning of the reorganization and RIF. Moreover, they achieve exactly the opposite of many guiding

tenants of participatory management (trust and delegating authority and responsibility to the lowest level to name two). The financial decisions mentioned above, together with the fact that the Office of Geology has rolled over millions of dollars at the end of the past two fiscal years, send a clear signal that will not be well received by an organization that has just separated hundreds of people.

We are concerned that these decisions, particularly made in the absence of program input, will have undue negative impacts on the scientific health and morale of the Division. Moreover, we are deeply concerned that these decisions will cost your administration its credibility.

During the past year, many of us argued that a RIF was necessary to restored scientific health to the Division, defended that decision to the troops, told them that the fat would be cut from the Division's administrative ranks so that more dollars could reach the front lines, then implemented the painful downsizing. Our expectation was a New Division where open decision-making and selfless attitudes would prevail. Much to our chagrin, we see the new organization conducting business-as-usual with power being concentrated and money being controlled by an elite few.

We ask you to think about the implications of decisions that are being passed down, and about the message that is being sent to the troops in the way decisions are being made. We welcome the opportunity to work with you to resolve these issues.

APPENDIX DOCUMENT 14

This document is provided to show that petitioner did have an active interest in preserving his rights contrary to statements in the trial court's Order To Dismiss.

Docket Number: DE-0351-05-0377-I-1
To: U.S. Merit Systems Protection Board, James Kasic, Administrative Judge
From: William C. Butler, Appellant
Subject: Response to your *Order To Show Cause* of June 24, 2005 and Request for Clarification
Date: July 8, 2005

This is a response to your order of June 24, 2005. It clearly and overwhelmingly documents my ongoing history of responses to the 1995 USGS RIF. You requested that if your statement of factual data is incorrect that you wanted to have it corrected. Your order stated that my appeal "appears to be filed untimely". Your statement is incorrect for the reasons presented herein. I have actively participated in a ten-year effort to regain my Federal job and to seek another Federal job since receiving the RIF notice. If timely responses were not filed, it is because information was never sent to me by the Agency or other appropriate entity responsible for sending it. Not being informed about deadlines is beyond my control and a valid cause for any possible delays. When information containing deadlines has been sent to me, I have always responded in a diligent, professional, and timely manner. Among other issues, I present correct information in the following 15 points (five total pages):

1) The RIF notices were given to employees on August 14, 1995. I was 51 years old at that time and a career employee of 17.5 years within the Geologic Division. Because I was unjustly separated in the RIF, on August 25, 1995, I wrote a letter regarding this RIF to Ellen Oskoui, Office of Special Counsel, Washington, D.C. 20036, expressing my disbelief that the Civil Service Commission and Office of Personnel Management could allow the targeting of individual USGS employees by using fabricated competitive level codes designed specifically to separate employees -- especially the "older employees" who were close to retirement. This letter to Ellen Oskoui is OSC File No. MA-95-2067. OSC responded to me on September 1, 1995, on November 30, 1995, on December 8, 1995, and on December 28, 1995. My inquiry through official and recommended channels was very timely.

Although... a) my GS and GM grades had been 12, 13 and 14, and b) for five years I was Deputy Branch Chief and Acting Branch Chief, and c) I had a BS, MS and PhD, and d) I supervised at one time over 200 employees, and e) I worked in my position for 17.5 years with fully satisfactory to excellent performance ratings, and f) I occupied Merit Pay Supervisor, research, and operational positions, I had no bumping/retreating rights and was not allowed to even take a GS-3 position, or anything between a grade 3 and my current grade in 1995. I could easily have taken any geologist (research or operational) or technician job and worked satisfactorily at full performance level almost immediately.

I want also to point out that no reason was ever given to me for my separation from Civil Service employment (re: RIF casualty). Any reasonable person can see that the RIF was obviously a fraudulent way to terminate employees rather than to legitimately eliminate positions; it was a pretext orchestrated by ambitious power-hungry managers, none of whom (... or their friends) were RIF'd. See "*Designer Downsizing*" article in the Rocky Mountain News, December 12, 1997, also, "*RIF Rigging Alleged at Geological Survey*" article in Federal Employees News Digest, August 14,1995, v. 45, n. 2, and "*Feds' Bonuses Raise Ire – Some USGS Workers Got Bonuses After Layoffs*" article in the Rocky Mountain News, June 16, 1997, and "*Laid-off Female Scientists Sue*" article in the Rocky Mountain News, March 20, 2000. These are just several of the public documents showing that Civil Service job protections were apparently circumvented in the RIF. In the case of *Adam et al v. Norton*, 9th Cir. Docket No. 04-17365, ND CA No. C-98-2094 CW, it was shown that age discrimination was prevalent in the Geologic Division at the time of the RIF. I believe I was affected by those now public discriminatory practices and would be eager to show such in a hearing before MSPB.

The conversations among the USGS Geologic Division work force in 1995 was that managers were indeed targeting the older employees and desirous of keeping the "new blood" employees and getting rid of the "dinosaurs" or "older employees". Some younger employees were asked to transfer to Water Resources Division in order to save their jobs. In my

case, I did have access to information about how Bureau of Indian Affairs project money was being misapplied and misused to cover deficits elsewhere. It is my belief that for this reason, and secondly, for the reason that I had filed a successful complaint against my supervisor, and thirdly because of my age, that I was targeted for separation. Biases against certain employees, such as age and other personal factors, were definitely key elements in management's decision-making on who would be separated and who would be retained.

During the RIF I did attend the Agency-sponsored meetings to once again express dissatisfaction with the process, and my name appears on the official sign-up sheets. Undoubtedly, these actions show a very personal concern and "timely response" to a developing adverse situation. When one actively fights to retain their job, as I have amply demonstrated herein, it does indicate that one does have an genuine interest in possibly unlawful employment/separation practices; these concerns directly bear on the discrimination situation and timeliness issue you have ordered me to address. The reason that I have provided this background information is to show that I felt very strongly about the reasons I believed to be the cause for separation, and as a result I actively tried to reverse what had happened by taking advantage of options that were promulgated to me. However, as I later found out, not all options and information was provided so that choices could be made. The very productive careers of many professionals, including mine, were

destroyed overnight by the RIF, and this was of no small consequence.

2) On August 23, 1995, I talked in person with Congressman David Skaggs in Arvada, CO, about the recent violations with the USGS RIF procedures. On October 3, 1995, I wrote a letter to Representative David Skaggs, Washington, D.C. expressing the same concerns delineated in item #1 above. That meeting and letter are examples of my concern about discrimination and were done so in a timely manner.

3) Multiple attempts to access staffing and grade-position information from the Office of Personnel Management were unsuccessful. The responses were that this is privileged information. This information was critical to show that there were indeed other USGS positions that I could have retreated to and been fully qualified (...and in most cases, over-qualified) to assume those responsibilities. These attempts were done in a timely manner.

4) Through the Office of Personnel Management, I applied for the Priority Placement Program (Interagency Placement, OPM form 1478) on August 23, 1995, in order to be eligible for any available position vacancies in occupational series 1301, 1311 and 1350. I had full-time and part-time availability for down-graded positions per the Reemployment Priority List (RPL). A 27-page government Career Record showing qualifications was submitted with this application. This application which was accepted by OPM (notice of registration dated September 6, 1995) shows another documented

response to the unlawful act of discrimination and my ongoing willingness to exercise reasonable options in a timely manner.

5) I was a named class member when OFO certified the class on May 6, 2003. When EEOC makes a determination such as this, MSPB generally recognizes EEOC's determination on the issue of timeliness (*Dawson v. USPS*, 45 MSPB 194, (1990)).

6) I was officially recognized, i.e., "...hereby notified", as a named class member by the Agency when they sent me notification on May 21, 2003 of the class acceptance by OFO. This notification stated that I was a class member in accordance with 29 C.G.R. § 1614.204(e) and signed by J. Michael Bieszad, Chief Employee Relations Section USGS, Denver, CO. 80225. Furthermore, I contacted the Class Agent and I was named a class member when the class was certified by the Office of Federal Operations in March 23, 2003. This fact is known through exhibits provided to you by both the Class Agent and the Agency's representative in their April 29th, 2005 responses to your order of April 1, 2005.

7) I was again very clearly recognized by the Agency as a named class member when they were conducting their investigation and I received a questionnaire to fill out. I returned information on these interrogatory questions on May 13, 2004 and on May 24-2004 to the investigator, Ms Molly Smith, EEO Contract Investigator, POB 3814, Ketchum, ID 83340. The authorization to investigate stated: "This is to certify that Molly Smith and Barry Zamoff, investi-

gators employed by Delaney, Siegel, Zorn and Associates, and engaged by the U.S. Geological Survey Office of Equal Opportunity, has the authority to investigate all aspects of the complaint of discrimination based on age filed by Constance Throckmorton (class complaint CA-WGS-00-011), to require employees of this Bureau to cooperate with the investigator in the conduct of the investigation, and to require employees of this Bureau having knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence" This authorization was signed by the Formal Complaints Manager, Office of Equal Opportunity on February 10, 2004. The Office of Equal Opportunity indeed had me listed by full name and address as a class member of the age discrimination lawsuit. This Authorization To Investigate clearly and unequivocally demonstrates that I was a member of the ongoing legal process concerning the *age discrimination* complaint. Please note that I was *required* to provide knowledge about the discrimination that I believed was perpetrated against me. I was sent this interrogatory questionnaire specifically because I had expressed prior complaints about and dissatisfaction with the procedures regarding the USGS Reduction In Force of 1995 as specified in this Show Cause reply and because I was a bona fide class member. There is definitely a history of involvement here, including a paper trail, of my deep concern for the illegal RIF procedure and my loss of employment because of it that dates back to August 1995. My response has thus been timely.

8) You seek to dismiss my case by applying a regulation 5 C.F.R. §1201.154. This is an improper regulation to use in my case. This regulation is for those who previously appealed to MSPB. I did not previously appeal to MSPB. My appeal is a result of your dismissal of the mixed-case, class-action of Throckmorton v. Interior DE-0351-05-0239-I-1.

9) My right to appeal is covered under 5 C.F.R. §1201.27. It stems from your May 2, 2005 dismissal of the class action. You should have docketed my individual appeal when you dismissed the class (*Scott v. Department of Treasury*, 71 MSPR 42 (1996)). (Class action status was denied by the judge; on a PFR the Board directed the judge to docket a separate appeal for each appellant identified in the initial appeal if the judge continued to deny class action status.), and because you did not, I filed on June 8, 2005, to protect my rights.

10) The Agency failed to inform me of my choices in an appeal, thus I was not able to make a valid selection of forum. My RIF notice mentioned nothing about choices for filing different claims and did not discuss the consequences of any selection. Again, that information was withheld from me by the Agency and I did not know what the basis was for contesting the RIF. If you doubt this, a hearing will bring out the facts supporting my claim on this issue.

11) You question the timeliness of filing. When a case is pending, the timeline for filing an appeal is extended (*American Pipe & Construction v. Utah*, 414 U.S. 538 (1974)), and 5 CFR 1201.27 (a) presents a

clear statement of this timing issue: "When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals." You issued your decision on April 6, 2005. I was not sent notification of this decision. When I did learn of it through other means, I immediately (within 24 hours) appealed to MSPB.

12) I feel that I have met my burden of proof by providing overwhelming evidence. I corrected the incorrect information you presented and pointed out the proper statue relating to mixed-case, class-action appeals. I request a hearing on these matters if you are not satisfied as to the preponderance of evidence that I have already provided.

13) I am still interested in participating in settlement talks. I note you directed the Agency to contact me within 35 days of your first contact in your acknowledgment response to my appeal. As to this date of July 8, 2005, the Agency has not contacted me. Additionally, in your letter to me of June 14, 2005, Preliminary Status Conference Order, you wrote: "...I will discuss settlement options during this conference..." No settlement options were actually discussed in this telephone conference call on June 24, 2005, among you, Stephen Mish, and me.

14) I am not an attorney; as yet I have not retained an attorney to protect my rights in this age discrimination action. I expect the MSPB, as may be required by law, to protect my rights and henceforth

keep me informed of my options and all decisions they make that affect my appeal. I am prepared to show that I was discriminated against on an individual level based on age and other factors.

15) I hereby request clarification on the issue of what the legal standards and criteria are to show involvement in the class and what the activities and timeliness should have been once I was designated a class member in this discrimination appeal.

CERTIFICATE OF SERVICE

I certify that this reply to the Show Cause Order was sent by e-filing (identification number 9412854) at https://e-Appeal.mspb.gov. on July 8, 2005, and also hand-delivered on July 8, 2005, to U.S. Merit Systems Protection Board; furthermore, a copy was hand-delivered to the Agency (Department of the Interior) on July 8, 2005:

Stephen Mish, Esq.
The Department of The Interior
Office of the Regional Solicitor
755 Parfet Street, Suite 151
Lakewood, CO 80215

James A. Kasic, Administrative Judge
U.S. Merit Systems Protection Board
165 S. Union Blvd., Suite 318
Lakewood, CO 80228-2211

s/ William C. Butler, Appellant
Docket no. DE-0351-05-0377-I-1